Feb. 15. Argued - Allegheny - 13
19 - Arg. Concluded by Dobbin - Allegheny
Court taken

Feb. 24 Aff. Baltimore

SUPREME COURT OF THE UNITED STATES.

No. ~~196.~~ 118

WASHINGTON AND BALTIMORE TURNPIKE ROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

GOVERNMENT PRINTING OFFICE.

1. State by Charter Boston Turnpike Co. Statutes of
a Penalty by Law of State - Cannot be passed
2. State Constitutions like State Laws must be construed
by State Courts, if so construed Constitution or Law
is repugnant & Natural Law
3 Corporators take Charter for road to other
must be also use of Corporate Contract
Grant impairing its Value of Charter,
Such Corporate Life Franchise as may be
from other Improvements demanded by
Interests.

1185

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the court of appeals of the State of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the president, managers, and company of the Washington and Baltimore turnpike road, appellants, and the State of Maryland, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authoriiy exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said the president, managers, and company of the Washington and Baltimore turnpike road, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-two.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by—

R. B. TANEY,
Chief Justice of the Sup. Ct. U. S.

2 The United States of America to the State of Maryland, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Maryland, wherein the president, managers, and company of the Washington and Baltimore turnpike road are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error men-

tioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 26th day of December, 1862.

R. B. TANEY,
Ch'f Just. Sup. Ct. U. S.

3 Service of within acknowledged Oct. 28, 1863.

A. W. BRADFORD, *Gov'r.*

Filed Oct. 28th, 1863.

STATE OF MARYLAND, *Anne Arundel County, to wit:*

I hereby certify that on this twenty-eighth day of October, eighteen hundred and sixty-three, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the county aforesaid, personally appeared M. Bannon, and made oath on the Holy Evangely of Almighty God, that he served the within citation on A. W. Bradford, governor of Maryland, on this twenty-eighth day of October, eighteen hundred and sixty-three, and delivered to him a copy of the same. Sworn before—

WM. R. THOMPSON, *J. P.* [SEAL.]

Court of appeals of Md., December term, 1862.

4 WASHINGTON AND BALTIMORE TURNPIKE ROAD
vs.
THE STATE OF MARYLAND.

"Justice Goldsborough delivered this opinion:"

By the act of 1812, ch. 78, the appellant was incorporated, with authority to make a turnpike road from the District of Columbia to the city of Baltimore. By the 16th section of the act, the company was authorized to charge the tolls specified therein, as a compensation for their expenditure in establishing the road. It cannot be doubted that the legislature in making this grant sought to promote the public convenience by the increased facility of travel incident to such an improvement; and the company, in accepting the grant, obliged itself to establish the road to effect this object, and keep the same in repair, in accordance with the requirements of the 13th section of the act of incorporation.

True it is, that by the 26th section provision is made for the punishment of the company, and its agents, if it shall neglect to keep the road in good and perfect repair, yet it is manifest that this provision was intended to apply only to temporary neglect, and cannot be held to deprive the
5 State of its sovereign power to annul a grant when the purposes of it have failed through the positive or negative act of the party upon which the grant was bestowed, and when, by a proper legal proceeding, the court having jurisdiction shall determine, upon evidence, the issue for the State. In 23d Wendell's R., 244, the supreme court of New York said: "But it is a rule of almost universal application, that if a statute fixing a penalty for an offence do not, either expressly or by necessary implication, cut off the common law prosecution or punishment for the same offence, it shall be taken to intend merely a cumulative remedy."

It was contended by the appellant that the legislature, in bestowing the power granted in the 31st section of the act, could not, through any tribunal, impair a demise made in view of the grant. This proposition is clearly erroneous. In 8th Peters, 287, it is laid down that "a corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser or nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with refer-

ence to them; and it would be a doctrine new in the law that the ex-
6 istence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

We have confined ourselves thus far to the consideration of the privileges, immunities, and liabilities of the appellant under the act of 1812.

The company continued to enjoy these privileges and immunities undisturbed until the institution of the suit in this case under the provisions of the act of 1860, ch. 326. By this act, the States' attorneys therein named were directed to institute proceedings, in the name of the State, against the appellant, to ascertain whether its charter and corporate powers and franchises ought, by reason of nonuser or abuser of those powers and franchises, to be declared vacated and annulled. To carry into effect this act a writ of scire facias was issued out of the superior court of Baltimore City in the name of the State, as plaintiff, against the appellant, as defendant.

To this writ the appellant appeared and pleaded the nine pleas mentioned in the record. The appellee demurred to the first seven pleas, moved
7 the court that the eighth be stricken from the record because it was not filed within the time required by the rules of court, and joined issue on the ninth. The court sustained the demurrers and granted the plaintiff's application to strike out the 8th plea. The defendant then filed a plea to the jurisdiction of the court, alleging in its plea that the action instituted was a criminal information, and should have been instituted in the criminal court of Baltimore City. To this plea the plaintiff also demurs, and the court sustained the demurrer.

At the trial of the cause upon the ninth plea of not guilty, the defendant took six exceptions to the ruling of the court. The first, to the admissibility of the evidence of Michael Waterman. The second, to the proposal of the plaintiff to offer evidence to show a want of repair of the defendant's road in parts thereof lying outside of the limits of the city of Baltimore. The third, to the admissibility of evidence of a want of repair of defendant's road, existing more than a year before the commencement of this suit. The fourth, to the refusal of the court to allow the defendant to ask the witness Rittenhouse the questions stated in this exception. The fifth, to the refusal
8 of the court to allow the defendant to offer the evidence mentioned in this exception, to rebut the evidence offered by the plaintiff to maintain the issue on her part. And the sixth, to the plaintiff's prayer, granted by the court.

Upon the rendition of the verdict by the jury, the defendant moved in arrest of judgment, which motion the court overruled and entered judgment for the plaintiff, as stated in the record, including costs.

As to the plaintiff's demurrers, we deem it proper to say to the proposition of law stated by the appellant, that a general demurrer to a plea confesses all the facts in the plea, must be added the qualification that they be well pleaded. (7th H. and J., 372; 2d H. and G., 143.) Upon a general demurrer, the court will render judgment against the party which commits the first error in pleading, (1 H. and G., 471; 10 Gill and J., 27;) and as the demurrers, according to the well-established rule, carry us up to the first fault, we must resort in this case to the scire facias to see if there be sufficient cause of action stated to enable the appellee to recover. If so, our attention is next directed to the pleas, and determine whether any or all of them are sufficient in law to entitle the appellant to judgment thereon. In reference to
9 the motion in arrest, we find in the case of Charlotte Hall School *vs.* Greenwell, 4th G. and J., 416, the court said: "The motion in arrest of judgment serving in some measure the office of a demurrer, we must consider that the whole record was brought to the view of the court. The

motion in arrest of judgment must be governed by the principle of a demurrer."

The plaintiff relying on its demurers to defendant's pleas, and the defendant on its pleas and motion in arrest, so far as the pleadings are concerned, has induced us to set out the above ingredients of a general demurrer and motion in arrest, that we may correctly dispose of this case so far as it is affected by these proceedings.

Does the scire facias in this case, being in the nature of an original action, set out a substantial cause of action, and with such certainty that the defendant is fully informed of the grounds on which the plaintiff seeks to recover? Our opinion is that it does. The scire facias sets forth the obligation of the defendant under the act of incorporation, and expressly charges a violation of this obligation and the mode and manner in which it
10 was violated, and, in the language of the act, seeks to ascertain whether the charter and corporate powers and franchises of the defendant *out* not, by reason of nonuser and abuser of said powers and franchises, to be declared vacated and annulled. The writ fully discloses the plaintiff's cause of complaint, and affords the defendant the opportunity of defense, of which it has availed itself fully in its several pleas.

We shall next consider whether the writ of scire facias was the appropriate remedy to obtain the object intended by the act of 1860, ch. 326. Of this we think there can be no doubt. In the case of the Canal Co. *vs.* the Railroad Co., 4th G. and J., 121, 122, in the case of the Regents of the University *vs.* Williams, 9th G. and J., 425, and in Angell and Ames on Corporations, 7433, American edition, scire facias was held the appropriate remedy in a case like this. But it was contended by the appellant that as the act of 1860 prescribed no form of proceeding, and the act of 1832, ch. 306, which did prescribe the proceeding by scre facias, was repealed by the code, the superior court, if it could entertain jurisdiction, was restricted to the ascertainment "whether the charter and corporate powers and fran-
11 chises of the president, managers, and company ought, by reason of nonuser or abuser of such powers and franchises, to be declared to be vacated, annulled," without power to enter judgment upon the ascertainment.

The answer to this is, not only that the appellant prays judgment in every plea, if sufficient to bar the plaintiff's action, but it could not be deprived of its charter except upon full hearing and judicial judgment of forfeiture. The theory of the appellant would render the act of 1860 nugatory, and if the legislature passed a law predicated upon the ascertainment, declaring the charter of the appellant annulled and forfeited, it might be exercising judicial functions contrary to the constitution and bill of rights, about which, however, we need express no opinion.

The act of 1832, though prescribing the mode of proceeding by scire facias, created no new remedy, but was merely declaratory of the law as it then was, and its repeal, by the code, took no jurisdiction from the courts of common law, but left that jurisdiction undisturbed.

Testing the appellant's pleas by the rule that the facts set out in
12 them must be well pleaded, we do not find that those in the first and second pleas offer a legal defence to the allegations charged in the appellee's writ of scire facias if those allegations are sustained by competent evidence to justify the jury in finding for the plaintiff on the issue of not guilty. The State, through its legislative department, may have impaired the value of the franchise of the appellant by the acts mentioned in those pleas, yet it was damnum absque injuria. It was a misfortune. (See Baltimore and Ohio R. R. Co. *vs.* Washington and Baltimore turnpike road, 10th G. and J., 392; Charles River Bridge *vs.* Warren Bridge, 11th Peters,

420.) The acts of the legislature by no means released the appellant from the fulfilment of its obligations under its charter. It was still enjoying the privilege of charging tolls upon its road, and was bound to render a full equivalent to the community to justify the charge.

As to the allegation in the scire facias that the appellant failed to keep the bridges over the streams crossing the turnpike road in good order and repair, it is no sufficient answer to say that the 13th section of the
13 act of 1812, giving power to erect bridges, was permissive only, and not mandatory. If the bridges were an essential part of the road and the road was impassable without them, it was a part of appellant's duty, having erected them, to keep them in repair. (See 23 Wendell's R., 259.)

As to the third and fourth pleas, and the facts therein stated, it may be true that the act referred to was passed, recognizing the corporate existence of the appellant, and admitting that the road was then maintained and kept in sufficiently good order and repair, and that during the whole of the year next preceding the commencement of this suit it was kept in as good order and repair as it was when the act of 1839 was passed; or, as in the fourth plea, that the State, by the act of the legislature and conduct of its officers, admitted that until 1858 the turnpike road was kept in sufficiently good order, and while in that condition was enabled to make the agreement stated in this plea, and in consequence of this agreement and sale of stock the road was put in better order during the year next preceding the commencement of this suit than it was at the time of the agreement to purchase; yet
14 it cannot be successfully contended that the State (though tacitly waiving, during the time above stated in these pleas, the enquiry into the condition of the road) deprived itself of the right to ascertain whether the appellant had been guilty of nonuser or abuser of its franchises, and to direct that ascertainment to be made in view of the requirements of the act of incorporation, which was the true and only standard of the appellant's responsibility.

Notwithstanding the act of 1833, mentioned in the fifth plea, and the privilege to charge tolls on steam carriages, the resolution of the company to contract for the loan of money upon the security of the tolls, and though the appellant may have applied all the tolls, as stated in the seventh plea, to the repair of the road, yet the conclusion arrived at by this court in reference to the third and fourth pleas is equally applicable to the fifth and seventh; and as to the sixth, our opinion of that may be found in our review of the rights of the appellant under the 31st section of the act of 1812.

We are of opinion that the action of the superior court was right
15 in striking out the eighth plea. If it was not filed within the time prescribed by the rule of court, we must presume that the court acted in conformity with its own rule, in the absence of the rule from this record. (See Cherry *vs.* Baker, 27th M. R., 75.) Whatever might be said of the conduct of the appellant in delaying to file the 10th plea until the decision of the court upon the demurrers and plea of limitations, we are at liberty to presume that, as the appellant joined issue on the demurrers, it took the chance of a judgment in its favor on some one or all of them, and, we doubt not, if the court had so decided, no exception would have been urged as to its jurisdiction. But apart from this, in our opinion, the proceedings under the scire facias, in all its stages, in this case is essentially a civil action, and within the cognizance of the superior court, that court having civil common law jurisdiction under the constitution of the State.

We proceed to consider the appellant's several exceptions. As to the first exception, the rule is, where evidence is offered to the court, who are to determine whether the witness is interested, if it appear to the court
16 that he is not, though he thinks himself interested, he shall be sworn. (See 6th H. and J., 172.) In view of this rule, we think that Waterman

was a competent witness. The proposal to offer evidence to the jury as mentioned in the second exception could not be objected to by the appellant on the ground stated in this exception, because the road was an unit, and the evidence should be coextensive with the limits of it, as established by the act granting the charter. The third exception presents the question of limitation, and involves the construction of the 10th section of the 57th article of the code. Conceding that a defence under that provision of the code may be availed of under the general issue, without being specially pleaded, but without so deciding, still we are of opinion that the provision of the code referred to does not apply to a proceeding like this; although the result of a decision on the scire facias against the defendant will involve the forfeiture of its franchise, yet it cannot be said that this is a suit for a fine or forfeiture within the meaning of this section of the code. A
17 reference to the original act of 1777, ch. 6, containing the same provisions as that found in the code, will show the meaning of the code; and the appellee was not confined to evidence of want of repair within the year. The refusal of the court to allow the appellant to ask the questions of the witness Rittenhouse, stated in the fourth exception, was correct. The contemplated speculations of the witness in the event of the condemnation of the road were wholly irrelevant to the issue before the jury. The appellee having offered evidence tending to show the wilful neglect of the appellant in keeping its road in repair, the appellant sought to rebut this evidence with the evidence stated in the fifth exception; upon the objection of the appellee to this evidence, the court sustained the objection, and we think correctly. All the facts relied on by the appellant in this exception might tend to prove an inability to keep the road in repair, and yet its responsibility was not removed by such inability. The objection made by the appellant to the charge of wilful neglect, in our opinion, is misconceived. The term does not in this case imply criminality, but must be construed to mean permissive, voluntary neglect.
18 We see no objection to the ruling of the court in granting the appellee's prayer, mentioned in the sixth exception. The prayer submits to the jury to find whether the appellant failed and neglected to maintain and keep its road, or parts thereof, and the bridges over the streams crossing the road, also, in good order and repair, and whether the same were maintained in the manner prescribed by the act of 1812, ch. 326; and incorporates into the prayer the very requirements of the act as the subject of enquiry for the jury. We therefore sustain the ruling of the superior court upon all the exceptions taken by the appellant.

Having approved of the action of the court upon the demurrers, in which we regarded the applicability of the scire facias to this case, and also the sufficiency of the allegations set out in the writ, we deem it unnecessary to say anything in reference to the motion in arrest of judgment. The judgment must be affirmed. Judgment affirmed.

True copy.
Test:

WM. A. SPENCER, *Clerk.*

19 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland, begun and held for the said State, at the city of Annapolis, on the first Monday in December, being the first day of said month, in the year of our Lord one thousand eight hundred and sixty-two, and in the year of the independence of the United States of America the eighty-sixth.

Present: The Honorable Richard I. Bowie, chief justice; James L. Bartol, Bruce I. Goldsborough, S. Morris Cochran, associate justices; William A. Spencer, clerk.

Among others were the following proceedings, to wit:

THE PRESIDENT, MANAGERS, AND COMPANY OF THE Washington and Baltimore Turnpike Co.
v.
THE STATE OF MARYLAND.

Be it remembered, that now here, on the first Monday in June, being the second day of the said month, in the year of our Lord one thousand
20 eight hundred and sixty-two, the judge of the fifth judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmit to the court of appeals here the record of proceedings of a plea which was lately depending before him in the superior court of Baltimore City, between the State of Maryland, plaintiff, and the president, managers, and company of the Washington and Baltimore turnpike road, defendant, and wherein the said superior court gave judgment for the State of Maryland against the said the president, managers, and company of the Washington and Baltimore turnpike road, and from which said judgment the said the president, and managers, and company of the Washington and Baltimore turnpike road, appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

21 STATE OF MARYLAND, *Baltimore City, to wit:*

At a session of the superior court of Baltimore City, in the fifth judicial circuit of the State of Maryland, begun and held at the court-house in and for the city aforesaid, on the second Monday in January, in the year of our Lord one thousand eight hundred and sixty-two.

Present: The Honorable Robert N. Martin, judge; Edward R. Sparks, esquire, sheriff; George E. Sangston, clerk.

Among other, were the following proceedings, to wit:

THE STATE OF MARYLAND
vs.
THE PRESIDENT, MANAGERS, AND COMPANY OF THE Washington and Baltimore Turnpike Road.
} Sci. fa's to vacate charter, &c.

Be it remembered, that heretofore, to wit, on the twelfth day of May, in the year of our Lord eighteen hundred and sixty, the said the State of Maryland, by Milton Whitney, William Price, Nelson Poe, J. P. Poe, Poe, and R. J. Gittings, esquires, its attorneys, prosecuted and sued forth the writ of the State of Maryland, of scieri facias, to the sheriff of Baltimore County directed, in the words and of the tenor following, to wit:

STATE OF MARYLAND, *City of Baltimore, sct:*

The State of Maryland to the sheriff of Baltimore City, greeting:

[SEAL'S PLACE.] Whereas at a session of the general assembly of Maryland, begun and held at the city of Annapolis, on Monday, the 2nd of November, 1812, and ended on the 2nd of January, 1813, an act was passed, chapter 78 of the acts of said session, "An act to incorporate a company to make a turnpike road from the District of Columbia to the city of Baltimore;" and whereas the said act of assembly was accepted, and the stockholders in the said company incorporated and constituted a body politic, by the name of the president, managers, and company of the Washington and Baltimore turnpike road, and the said turnpike road made in pursuance of the provisions of said act; and whereas, by the thirteenth section of said act, it is enacted that the said president, managers, and company shall have power to erect permanent bridges over

all the waters crossing the said road, wherever the same may be found necessary, shall lay out said road sixty feet wide, and shall cause eighteen feet at least in breadth to be made an artificial road, which shall be made solid, durable, and even to the surface, by bedding the same with wood, stone, sand, or gravel, a sufficient depth to secure a good foundation to the same, and the said road shall be faced with gravel or stone pounded, or other small hard substance, in such a manner as to secure a firm, and, as nearly as the materials will reasonably admit, an even surface, and so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees with a horizontal line, and shall for-
22 ever hereafter, during the continuance of the said incorporation, maintain and keep the said road in the same good order and repair: Nevertheless, the said president, managers, and company, notwithstanding the said requirements of said act, of said thirteenth section especially, have wilfully and for a long time neglected and failed to keep their said road or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as are required by said act, and by said thirteenth section especially, in violation of their chartered obligations, and in disregard of the rights of the State, and to the great injury, inconvenience, and detriment of the public travelling upon said road.

And whereas the general assembly of Maryland did, at the January session of the year 1860 enact a law entitled An act to authorize and direct the State's attorneys for Baltimore City, Baltimore County, Anne Arundel County, and Prince George's County, to institute proceedings to forfeit the charter of the president, managers, and company of the Washington and Baltimore turnpike road, whereby the said State's attorneys were directed to institute proceedings in the name of the State against said president, managers, and company, to ascertain whether the charter and corporate powers and franchises of said president, managers, and company ought, by reason of nonuser or abuser of said powers or franchises to be declared vacated and annulled:

Now, therefore, you are commanded that by good and lawful men of your bailwick, you give notice to the said president, managers, and company of the said Baltimore and Washington turnpike road, to be and appear before the superior court of Baltimore City, on Monday, the fourteenth day of May instant, to show if they have or can say anything why their charter and corporate powers and franchises ought not to be declared to be vacated and annulled.

Witness the Honorable Robert N. Martin, judge of the said court, this 12th day of May, 1860.

GEO. E. SANGSTON, *Clk.*

At which said second Monday in May, in the year last aforesaid, and the return day of the said aforegoing writ, comes into the court here the said plaintiff, by its attorneys aforesaid, and the sheriff of Baltimore City aforesaid, to whom the said writ was in form aforesaid directed, makes return to the court here thus endorsed, to wit:

Made known by service on Langdon Ewing, secretary.

GEORGE H. DUTTON, *Sheriff.*

And upon said writ was the following endorsement, to wit:

"Service of the within admitted this 14th May, 1860.

"LANGDON EWING, *Sec'y W. & B. T. Company.*"

And the said defendant, being so forewarned, appears in court here by George W. Dobbin, esquire, its attorney.

And thereupon, in pursuance of the notice aforesaid, it is ruled by the

court here, on motion of the said plaintiff, by its atrorneys aforesaid, that the said defendant plead to the writ of the State of Maryland aforesaid, within the ensuing fifteen days, or judgment by the court here will be rendered against it in default thereof.

And the said defendant, by its attorney aforesaid, defends the wrong and injury, when, &c., and prays leave of the court here to imparle until the second Monday of September then next, and it hath it; the same day is given to the said plaintiff then and there, &c.

At which said second Monday of September, to wit, in the year last aforesaid, until which day the said defendant had leave to imparl, and then to answer the aforesaid writ of the State of Maryland in the plea aforesaid, come again into the court here the parties aforesaid, by their attorneys aforesaid. And the said defendant as before prays leave of the court here further to imparle until the second Monday of January then next, and it hath it; the same day is given to the said plaintiff, then and there, &c.

23 At which said second Monday of January, to wit, in the year of our Lord eighteen hundred and sixty-one, until which day the said defendant had leave to imparle, and then to answer the aforesaid writ of the said plaintiff in the plea aforesaid, come again into the superior court here the parties aforesaid, by their attorneys aforesaid. And thereupon the said defendant, by its attorney, in pursuance of the rule aforesaid, files in court here the following pleas, to wit :

In the superior court of Baltimore City, January term, 1861.

The President, Managers, and Company of the Baltimore and Washington Turnpike Road *ats.* The State of Maryland.	Writ of sciri facias.

The defendants, by their attorney, crave oyer of the said writ of sciri facias, and to them it is read as follows, (here insert it,) which being read and heard, the defendants say that after said turnpike road was perfected from the District of Columbia to the city of Baltimore, and had been examined, approved, and licensed, in the manner prescribed by the fifteenth section of the act to incorporate said company, the general assembly of the State of Maryland passed an act of the 28th of February, 1829, to incorporate the Baltimore and Ohio Railroad Company, and subscribed for a large amount of the stock of the said company; and without the consent and against the will of the said president, managers, and company there was, under the authority of an act passed on the 22d of February, 1830, by the general assembly of the State of Maryland, and under the authority of an act passed on the 2d of March, 1831, by the Congress of the United States, constructed and put in operation a branch railroad from the Baltimore and Ohio Railroad to the City of Washington, and from the time the same was put in operation until the present time, there has in every year been transported on said branch railroad a large number of persons who, and a large amount of property which, had the said branch railroad not been put in operation, would have passed on said turnpike road; and for such transportation said railroad company has received and is receiving large sums of money. And the defendants say that the said branch railroad has been constructed not only under the authority of the State of Maryland, but in great part with the State's own money, to wit, to the amount of five hundred thousand dollars, for which, under the said act of 22d of February, 1830, it has a separate and distinct stock, and also in great part for the State's own profit; and not only has the State a profit as a stockholder, but under an act of the general

assembly passed on the 4th of March, 1833, there has been paid and is still paid to the treasurer, for the use of the State, one fifth of the whole amount received for the transportation of passengers on said branch railroad; and the said branch railroad is in great part under the State's own management. And the defendants say that although before and until transportation on the said branch railroad the said turnpike road was, out of the money collected and received by the tole-gatherers, maintained and kept in the same good order and repair in which it was at the time it was examined, approved, and licensed as aforesaid, yet through and by means of the transportation on said branch railroad, the defendants have been, and still are, deprived of so much of the income which, but for such transportation, would have been received by them, that it is impracticable for them, with all the income that they receive from such persons and property as pass on the turnpike road, to maintain and keep the said turnpike road in any better order and repair *that* it now is; and so the defendants say that they have not, as in the said writ of sciri facias is suggested, wilfully and for a long time neglected and failed to keep their said road or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as is re-
24 quired by the act in said writ first mentioned; but that if there has been such failure, it has arisen from the act of the State herself, and by and through her own means. And this the defendants are ready to verify, wherefore they pray judgment *of* their chartered and corporate powers and franchises ought to be vacated and annulled.

2nd. And for a second plea, the defendants say that at the time the general assembly of the State of Maryland was legislating for the construction of the railroad mentioned in the act of the 22nd of February, 1830, referred to in the first plea, the said president, managers, and company did remonstrate and protest against the same, and did predict and declare that the consequence of the proposed action on the part of said State in constructing said railroad would be to reduce the toles and revenues of said turnpike road so low that the whole thereof would be insufficient to keep said turnpike road in good and proper condition and repair; whereupon the general assembly, professing to recognize the importance of preserving the turnpike road in its then state of usefulness, did, in the fourth section of said act, enact that the said president, managers, and company should be allowed and authorized to subscribe for and furnish a certain portion of the funds to be used in the construction of said railroad, the dividends in virtue of which subscription were to be applicable, in the first place, to put and keep said turnpike road in good and sufficient repair.

And the said president, managers, and company say that even if the privilege of so subscribing had been in any sense a just and adequate or proper mode of keeping said turnpike road in repair, yet the whole of their capital had been expended in the construction of said turnpike road, and they had not the means of subscribing to said railroad; and moreover, under an act of the general assembly of said State, passed on the 9th of March, 1833, the right to make such subscription ceased and determined within six months after the passage of the last-mentioned act; and although the effect of the transportation on said railroad was to deprive the said president, managers, and company of much income which, had the said railroad not been constructed, might and would have been received by them, and although without some just compensation for the income of which they were so deprived, they could not maintain and keep the said turnpike road in any better order and repair than it now is, yet no such compensation has been made; and so the defendants say that they have not, as in the said writ of *sciri facias* is suggested, wilfully and for a long time neglected and failed to keep their said road or parts thereof, and the bridges over the streams crossing said

road, in such good order and repair as is required by the act in said writ first mentioned; but that if there has been such failure, it has arisen from the act of the State herself in depriving the said president, managers, and company of much income as aforesaid, and making to them no compensation therefor; and under such circumstances, to vacate and annul their chartered and corporate powers and franchises would be contrary to the constitution of the State of Maryland, and to the constitution of the United States. And this the defendants are ready to verify.

Wherefore they pray judgment if their chartered and corporate powers and franchises ought to be vacated and annulled.

3d. And for a third plea in this behalf the defendants say that on the 10th of February, 1839, the general assembly of the State of Maryland passed an act whereby, after reciting that there was then pending in Baltimore County court an action brought by the Washington and Baltimore turnpike road against the Baltimore and Ohio Railroad Company, and that it was of great importance to the said companies, and of public interest, that the questions involved in said action should be speedily settled, it was enacted that the court of appeals of the Western Shore of Maryland was thereby authorized and directed to hear any appeal that might be taken from the decision of Baltimore County court in the said cause, at the first term
25 of said court, to which said appeal might be carried up, thus by the said act of the general assembly admitting that the said turnpike road was then maintained and kept in sufficiently good order and repair, and that no sufficient cause then existed for vacating and annulling the chartered and corporate powers and franchise. And the defendants say that during the whole of the year next preceding the commencement of this suit the said turnpike road has been maintained and kept in as good order and repair as it was at the time of the passage of the said act of the 10th of February, 1839. And this the defendants are ready to verify; wherefore they pray judgment if their chartered and corporate powers and franchises ought now to be vacated and annulled.

4th. And for a fourth plea the defendants say that the State of Maryland by the acts of the general assembly of said State and the conduct of its officers, has admitted that until the day of , 1858, the said turnpike road was maintained and kept in sufficiently good order and repair, and that until the time last mentioned no sufficient cause existed for vacating and annulling the chartered and corporate powers and franchises; and by such admissions stockholders in the said turnpike company were at the time last mentioned enabled to make an agreement to sell, and other persons were at the same the time induced to make an agreement to purchase at a large price, to wit, the price of sixteen thousand dollars, fifteen hundred and forty shares of stock in the said turnpike company, and pursuant to such agreement, to wit, on the 1st day of October, 1858, the said price was paid, and the said 1,540 shares of the stock transferred to the purchasers thereof. And the defendants say that the said transfer was made and the purchase money paid upon the faith of the admission by the State of Maryland, that while the said turnpike road was maintained and kept in as good order and repair as it was at the time of the said agreement to purchase, the State of Maryland would consider that no sufficient cause existed for vacating and annulling the chartered and corporate powers and franchises. And they further say that soon after the said transfer the said turnpike road was put in better order and repair, and during the whole of the year next preceding the commencement of this suit the said turnpike road has been in better order and repair than it was at the time of the said agreement to purchase. And this the defendants are ready to verify; wherefore they pray judgment if their chartered and corporate powers and franchises ought now to be vacated and annulled.

5th. And for a fifth plea the defendants say that on the 18th of March, 1833, the general assembly of the State of Maryland passed a supplement to the act first mentioned in said writ of sciri facias, by which said supplement it was enacted that the Baltimore and Washington Turnpike Company should be and were thereby authorized to charge toles on steam carriages travelling on their road, provided such toles, together with those from other sources, should not exceed the net profit of ten per cent., as provided in the twentieth section of the act to which the said act of the 18th of March, 1833, is a supplement; and after the purchase and transfer mentioned in the fourth plea, to wit, at a meeting of the stockholders in the said company, held on Tuesday, the fifth day of October, 1858, it was resolved that the president and managers be, and they were thereby, authorized to convert the turnpike road into a plank road, adapted to horse power or to both horse power and steam carriages, as they may deem most advisable, and to procure by loan or a pledge of the property, income, privileges, and franchises of the corporation the amounts of money that they may find requisite to the object; and at a meeting of the board of directors, held on the 4th of October, 1859, it was resolved that the president be authorized to have a new bridge construsted at Gwynn's Falls, and to have made, in addition to ordinary repairs, such further renewals of bridges on the line of the turnpike as might seem to him to be required; and it was further resolved that for these purposes the
26 president be authorized to borrow on the credit of the company, at interest not exceeding six per cent., the sum of three thousand dollars or such portion of the amount as he might find to be required. And the defendants say that pursuant to these resolutions of the board the president did have a new bridge constructed at Gwynn's Falls, and did have, in addition to ordinary repairs, some further renewals of bridges on the line of the turnpike, and for these purposes he borrowed on the credit of the company, in the fall of 1859, from certain persons, to wit, Moncure Robinson and William L. Savage, a large sum of money, to wit, the sum of two thousand dollars, and the whole of this sum of money was expended in constructing the said new bridge, and in such further renewals as aforesaid. And the defendants further say that the said money was borrowed and lent upon the faith of the toles and duties which the president and managers of the turnpike road are authorized to demand and receive for passage upon and along the said road, and on the confidence and upon the understanding and agreement that the said president and managers, under the thirty-first section of the act to incorporate said company, would, when required so to do, grant, demise, and to farm let to the persons from whom said money was borrowed, the said toles and duties for a term of seven years, under the resolution and condition that of the said toles and duties there should first be applied to keep the said road in repair so much as might be necessary for that purpose, and then the surplus be applied to repay the said *the said* two thousand dollars with interest thereon. And the defendants say that not only during all the time which has elapsed since the said money was so borrowed, but during all the time which has elapsed since the agreement to purchase, mentioned in the fourth plea, the whole of the said toles and duties have been applied to keep the said road in repair, and there now remains due and unpaid to the persons from whom said money was borrowed the whole of the said two thousand dollars with interest thereon, and to repay the same the defendants have no other means besides the said toles and duties; and if such security as is afforded by the said toles and duties shall now, against the consent of the persons from whom said money was borrowed, be taken away, it will in effect be taking their property for public use, without just compensation, contrary to the constitution of the State of Maryland and contrary to the constitution of the United States. And this the defendants

are ready to verify; wherefore they pray judgment if their chartered and corporate powers and franchises ought now to be vacated and annulled.

6th. And for a sixth plea the said president, managers, and company say that by the thirty-first section of their said charter they are authorized and empowered to grant, demise, and to farm let to any person or persons with whom they can agree, the toles and duties which they, by virtue of the said act, or by their own laws, are authorized to demand and receive for passage in, upon, and along the said road, for any term not exceeding seven years, under such rents, reservations, and conditions as the said president and managers at any meeting of their board should agree upon; which grants and demises shall have the construction, force, and effect as other like grants and demises made between private persons have and receive at law. And they further say that after the several matters and things set forth in their first plea for the purpose of keeping their said turnpike road in repair, and to rebuild a bridge thereon, in consideration of the sum of two thousand dollars to them paid, on the fourteenth day of November, in the year eighteen hundred and fifty-nine, by a certain Moncure Robinson and a certain William L. Savage, the said president and managers, at a meeting of their board, did grant and demise to the said Robinson and Savage the toles and duties which they are entitled and authorized to demand and receive for passage in, along, and upon said road for the period of seven years from the said fourteenth day of November, eighteen hundred and fifty-nine, the said Robinson and Savage covenanting to apply the said toles and duties to the ne-
27 cessary expenses of managing and keeping the said road in repair, and the surplus, if any, to the use of the said Robinson and Savage, so that the said president, managers, and company say that they are not now possessed of the said franchise, and that any condemnation of said franchise must be subject to the rights and property of the said Robinson and Savage therein, under the grant and demise aforesaid. And this they are ready to verify; wherefore they pray judgment if their chartered and corporate powers and franchises ought now to be vacated and annulled.

7th. And for a seventh plea the defendants say that although the general assembly of the State of Maryland intended, and in the 19th, 20th, and 21st sections of the act to incorporate the company provides, that there should be *toles* yielding to the stockholders in net profits not less than ten per cent. per annum, yet no such profits nor any profits whatever have been divided among the stockholders during the time which has elapsed since the agreement to purchase mentioned in the fourth plea, but during the whole of that time all of the *toles* and duties received per passage upon and along said road have been applied to maintain and keep the said road in good order and repair. And this the defendants are ready to verify, wherefore they pray judgment if their chartered and corporate powers and franchises ought now to be vacated and annulled.

8th. And for an eighth plea the defendants say that this suit was not commenced within one year from the time of the alleged forfeiture set forth in the said writ of sciri facias. And this they are ready to verify; wherefore they pray judgment if their chartered corporate powers and franchises ought now to be vacated and annulled.

9th. And lastly the defendants say that they are not guilty in the manner and form as in the said writ of sciri facias is suggested, and of this they put themselves upon the country, and the said plaintiff doth the like.

On the back of said pleas was the following endorsement, to wit:

"Service of copy admitted.

A. STIRLING, JR.,
N. & J. P. POE, *for State.*

And thereupon the plaintiff, by its attorneys, files in court here the following demurrer to the first, second, third, fourth, fifth, and sixth pleas, and motion to strike out eighth plea, and joinder in issue to the ninth plea, as follows, to wit:

THE STATE OF MARYLAND
vs.
THE PRESIDENT, MANAGERS, &C., OF THE BALTIMORE AND Washington turnpike road.

And the said State, by its attorneys, William Price, A. Stirling, jr., R. J. Gittings, Nelson Poe, and J. P. Poe, says that the first, second, third, fourth, fifth, sixth, and seventh pleas and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude it, the said State, from having or maintaining its aforesaid action thereof against the said president, managers, and company of the Baltimore and Washington turnpike road, and that it, the said State, is not bound by the law of the land to answer the same. And this it, the said State, is ready to verify; wherefore it prays judgment, and that the chartered and corporate powers and franchises of the said defendant ought now to be vacated and annulled.

WM. PRICE,
A. STIRLING, JR.,
N. & J. P. POE,
R. J. GITTINGS, *Atty's for the State.*

The said State, by its attorneys aforesaid, moves the court to strike from the record the eighth plea of the said defendants, because the said
28 plea, being the plea of limitations, was not filed within the time required by the rules of this court, and is otherwise irregular and insufficient.

And the said State, by its attorneys aforesaid, joins issue with the defendants on their ninth plea.

WM. PRICE,
R. J. GITTINGS,
N. & J. P. POE,
A. STIRLING, JR., *Atty's for State.*

On the back of the within demurrer is the following endorsement, to wit:

"Service admitted. GEORGE W. DOBBIN."

And thereupon further process of and upon the premises between the parties aforesaid, with the consent of the said parties by their attorneys aforesaid, and by order of the court here thereon, is further continued until the second Monday in May then next.

At which said second Monday in May, to wit, in the year last aforesaid, come again into the said court here, the parties aforesaid by their attorneys aforesaid. And thereupon, as before, further process of and upon the premises between the parties aforesaid, with the consent of the said parties by their attorneys aforesaid, and by order of the court here thereon, is further continued until the second Monday in September then next.

At which said second Monday in September, to wit, in the year last aforesaid, come again into the said court here the parties aforesaid by their attorneys. And thereupon, as before, further process of and upon the premises between the parties aforesaid, with the consent of the said parties by their attorneys aforesaid, and by order of the court here thereon, is further continued until the second Monday in January then next.

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At which said second Monday in January, to wit, in year eighteen hundred and sixty-two, come again into the said court here the parties aforesaid by their attorneys aforesaid. And thereupon the said defendant, by its attorney aforesaid, files in court here his joinder in demurrer to first, second, third, fourth, fifth, sixth, and seventh pleas, to wit:

In the superior court.

STATE
vs.
PRES., MAN., AND CO. OF THE BALTO. AND WASH. T. CO.

The defendants join issue on the demurrer to the first, second, third, fourth, fifth, sixth, and seventh pleas.

GEO. W. DOBBIN, *for Defendant.*

Whereupon all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereunto had, it is considered by the court here that the motion to strike out eighth plea and demurrer to first, second, third, fourth, fifth, sixth, and seventh pleas be, and the same are hereby, sustained.

And thereupon the said defendant, by its attorney aforesaid, prays an appeal from the opinion of the court sustaining the motion to strike out eighth plea, and also sustaining demurrer to first, second, third, fourth, fifth, sixth, and seventh pleas, to the court of appeals to be held for the State of Maryland, and to it it is granted.

Whereupon the defendant, by its attorney aforesaid, pray leave of the court here, according to the form of the act of assembly in such case made and provided, to file additional plea in the aforesaid cause, and to it it is granted.

And thereupon the said defendant, by its attorney aforesaid, files in court here the following additional plea, as follows, to wit:

29 In the superior court of Baltimore City.

THE STATE
vs.
THE PRES., MANAGERS, AND CO. OF THE WASH. AND BALTO. T. CO.

And the said defendant comes and says that this court ought not to have or take cognizance of the action aforesaid, because it says that the said action is a criminal information, instituted by the State's attorney, by the command of the legislature, in the name of the State, in order to forfeit and condemn the franchises of the said defendant, because of an alleged violation of its chartered obligations, and in disregard of the rights of the State, and to the great injury, inconvenience, and detriment of the public travelling upon said road; and as such criminal information the said defendant says that the said proceeding should have been instituted in the criminal court of Baltimore City, which is the only court which, under the constitution of the State, has criminal jurisdiction within the said city. And this the said defendant is ready to verify; wherefore it prays judgment whether this court can or will take further cognizance of the proceeding aforesaid.

GEORGE W. DOBBIN, *Att'y for Def't.*

And thereupon the said defendant, by its said attorney, prays that the said plaintiff may reply to the plea of the said defendant in the action aforesaid, whereupon it is ruled by the court here that the said plaintiff reply to

the plea of the said defendant in the action aforesaid, or judgment will be entered against it by default.

And thereupon the said plaintiff, by its attorneys aforesaid, in pursuance of the rule aforesaid, files in court here the following demurrer to additional plea, to wit:

THE STATE
vs.
THE PRESIDENT, MANAGERS, AND COMPANY.

The State by its counsel says that the additional plea to the jurisdiction, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude it, the said State, from having or maintaining its aforesaid action thereof against the said defendants, and that it, the said State, is not bound by the law of the land to answer the same. And this it, the said State, is ready to verify.

Wherefore it prays judgment, and that the charters and corporate powers and franchises of the said defendants ought now to be vacated and annulled.

WM. PRICE,
R. J. GITTINGS,
N. & J. P. POE, *for State.*

On the back of said demurrer was the following endorsement, to wit:

"Service admitted.

"GEO. DOBBIN, *Att'y for Def't.*"

Whereupon the defendant, by its attorney, files in court here its joinder in demurrer, to wit:

In the superior court.

STATE
vs.
PRES., MAN., AND CO. OF THE BALTO. AND WASH. T.

The defendant joins issue in demurrer to the additional plea filed by it.

GEO. W. DOBBIN, *for Def't.*

30 Whereupon, all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereunto had, it is considered by the court here that the demurrer to the additional plea be, and the same is hereby, sustained.

And thereupon the said defendant, by its attorney aforesaid, prays an appeal from the opinion of the court sustaining the demurrer to additional plea to the court of appeals to be held for the State of Maryland, and to it it is granted.

Whereupon, for trying the issue aforesaid above joined between the parties aforesaid, it is ordered by the court here that twenty persons from the pannel of jurors returned to the court here by the sheriff of Baltimore City aforesaid, be drawn by ballot, according to the directions of the act of assembly in such case made and provided, and thereupon the twenty persons being so drawn by ballot, and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, that is to say,

Thomas B. Summers, Thomas R. Rich, James M. Lewis, Charles M. Foss, Joseph H. Boyd, John E. Hurst, William S. Thompson, S. S. Stevens, Theodore Hooper, A. F. Crane, Jackson Brown Baxley, Charles J. Steward, who being empannelled, sworn, and affirmed to say the truth in the premises upon their oath and affirmation, to say upon their oaths, do say that the said president, managers, and company of the Washington and Baltimore Turnpike Road Company have wilfully and for a long time neglected and failed to keep their said road or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as are required by law, and in violation of their chartered obligations, and in disregard of the rights of the State, and to the great injury, inconvenience, and detriment of the public travelling upon said road.

And thereupon the defendant, by its attorney aforesaid, filed in court its motion in writing in arrest of judgment, as follows, to wit:

In the superior court.

STATE
vs.
THE PRES., MAN., AND CO OF THE WASH. & BALT. T.

The defendant in this case moves in arrest of judgment, because for matters apparent upon the face of the record no judgment of condemnation and forfeiture of the rights and franchises of the defendants can rightfully be sustained.

GEO. W. DOBBIN, *Att'y for Def't.*

But because the court here are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, before the court here, on the second Monday of May then next, to hear judgment thereon, for that the court here are not yet advised thereof, &c.

At which said second Monday in May, to wit, in the year last aforesaid, come again into the said court here the parties aforesaid, by their attorneys aforesaid.

Whereupon, all and singular the premises being seen and by the court here fully understood, and mature deliberation being thereunto had, it is considered by the court here that the motion in arrest of judgment be, and the same is hereby, overruled.

Therefore it is considered by the court here that the charter so as aforesaid by the act of the general assembly of Maryland, passed at the session of 1812, ch. 76, granted to the president, managers, and company of the Baltimore and Washington turnpike road, be vacated and annulled, that the said corporate body be ousted, and their corporate rights, powers, privileges, and franchises cease and be void. And it is adjudged by the
31 court here that the said plaintiff recover against the said defendant, as well as the sum of two hundred and seventy-three dollars and forty-five cents, for its costs and charges by it about its suit in this behalf expended. And the said defendant, in mercy, &c.

Memorandum.—Judgment on verdict was rendered in this action on the 14th day of May, 1862, for plaintiff and costs.

Test: GEO. E. SANGSTON, *Cl'k.*

Memorandum.—Whereupon on the day and year last aforesaid the defendant, by its attorney aforesaid, files in court here the following bills of exceptions, to wit:

In the superior court of Baltimore City.

STATE
vs.
THE PRES., MAN., & CO. OF THE WASH. AND BALTO. TURNPIKE.

The plaintiff, to maintain the issue on its part joined, called as a witness Michael Wartman, who, being sworn on his voir dire, said that he resides in the thirteenth election district of Baltimore County; that his road to Baltimore is by the Sulphur Spring road, to where it joins the Washington road, and thence by the Washington road to the city; that he can also go by the Frederick turnpike road, which is about as far distant from his house as the Washington road is, but the distance from that road to the city is two and a half miles further than by the Washington road; that he has been in the habit of commuting his toll on the Washington road at twenty-five dollars per year; but this year he pays by the trip, which costs him ten cents for coming and going; that if the Washington road *that if the Washington road* be condemned in the present proceeding, he will travel over it free of toll, because, in his opinion, it will then be a county road.

Whereupon the defendant moved the court to exclude the said witness as incompetent to testify for the plaintiff, which motion the court refused, and permitted him to be sworn; to which the defendant prayed leave to except, and that the court would sign and seal this bill of exception, which is accordingly done on this 7th day of April, 1862.

R. N. MARTIN. [SEAL.]

2nd exception.

In the superior court of Baltimore City.

THE STATE
vs.
THE PRES., MAN., & CO. OF THE WASH. AND BALTO. T.

The plaintiff, to maintain the issue on its part, proposed to offer in evidence to the jury a want of repair of the defendant's road in parts thereof lying outside of the limits of the city of Baltimore, to the admissibility of which evidence the defendant objected; but the court overruled the said objection, and permitted the said evidence to go to the jury.

Whereupon the defendant excepted and prayed the court to sign and seal this its bill of exceptions, which is accordingly done on this 7th day of April, 1862.

R. N. MARTIN. [SEAL.]

3rd exception.

In the superior court.

STATE
vs.
THE PRES., MAN., & CO. OF THE WASH. AND BALTO. TURNPIKE.

32 After offering the evidence which is stated in the foregoing exception, which is made a part of this, the plaintiff, further to maintain the issue on its part, proposed to offer in evidence to the jury a want of repair of the defendant's road existing more than one year before the commencement of this prosecution, to the admissibility of which evidence the defendant objected; but the court overruled the objection, and allowed the said testimony to be given to the jury, whereupon the defendant prayed leave to except, and that the court would sign and seal this its bill of exception, which is accordingly done on this 7th day of April, 1862.

R. N. MARTIN. [SEAL.]

4th exception.

In the superior court of Baltimore City.

THE STATE
vs.
THE PRES., MAN., & CO. OF THE WASH. AND BALTO. T.

After offering the evidence stated in the foregoing bill of exceptions, which are made a part of this, the plaintiff, further to maintain the issue on its part, offered in evidence, by several competent witnesses, the want of repair of the defendant's road, among which witnesses was Charles Rittenhouse, who, being cross-examined by the defendant, stated that he had found in his own mind, and thinks he may have stated it to Mr. Sutton and Mr. Smith, a plan for the taking of this road, in the event of its condemnation, into the ownership of a new company to be by the said new company repaired and made subject to toll, which he thought would be profitable. He also stated that he had fixed upon the expenditure of eleven hundred dollars per mile, as the sum necessary to put said road in such productive condition. Whereupon the counsel for the defendant proposed to ask the witness by what calculation as to the expenditure of the said capital, and the necessary expenditure for repairs, and interest on said capital, he proposed to make said company a profitable investment; but the plaintiff by its counsel objected to said question, which objection the court sustained, and would not allow the said question to be put to the witness.

Whereupon the defendant prayed leave to except, and that the court would sign and seal this its bill of exception, which is accordingly done on this 7th day of April, 1862.

R. N. MARTIN. [SEAL.]

5th exception.

In the superior court of Baltimore City.

STATE
vs.
THE PRES., MAN., & CO. OF THE WASH. AND BALTO. TURNPIKE.

The evidence in the foregoing four bills of exception having been offered and given as therein stated, which said bills of exception are now made a part of this, the plaintiff, further to maintain the issue on its part, offered evidence to the jury tending to show the wilful neglect of the defendant to keep its road in repair, and here closed its case. Then the defendant, in order to rebut the allegation in the declaration, that the said defendant had wilfully and for a long time neglected and failed to keep its road in repair, and the evidence which the plaintiff had offered to sustain said allegation, offered to prove that it had expended its whole capital of one hundred thousand dollars, and forty thousand dollars now derived in part from the toles of a portion of the road then opened, and in part from additional subscriptions by its stockholders, in the building of said road, and that it had no other property but its franchise to take toles from persons using its said road, and that the said defendant expends the entire receipts of the road in its repair, and that the want of repair, if the jury shall find such to exist, is not the result of the wilful act of the said defendant, but arises solely
33 from its want of pecuniary ability. And the said defendant, in order to show the cause of such pecuniary inability, proposes to show by evidence to the jury the amount of the receipts and expenditures of the said road, prior to the opening and use of the Washington branch railroad, and the falling off of the said receipts thereafter and the causes thereof, and to read to the jury the acts of assembly of Maryland of 1827, ch. 170, s. 15,

and of 1828, ch. 139, s. 20, and of 1830, ch. 158, s. 4, to show the action of the State with reference to the defendant; to the admisibility of which evidence, so offered to be given by the defendant, the plaintiff by its counsel objected, and the court sustained said objection, and refused to let the said evidence go to the jury; whereupon the defendant by its counsel prayed leave to except, and that the court would sign and seal this its bill of exceptions, which is accordingly done on this 8th day of April, 1862.

J. P. P. R. N. MARTIN. [SEAL.]

In the superior court of Baltimore City.

6th exception.

STATE
vs.
THE PRES., MAN., & CO. OF THE WASH. AND BALTO. TURNPIKE.

The evidence in the foregoing five bills of exception having been offered and given as therein stated, which said bills of exception *and* now made a part of this, the plaintiff prayed the court to instruct the jury as follows:

If the jury believe, from the whole evidence in the case, that the defendant had at the time of the passing of the act of 1860, ch. 326, given in evidence, failed and neglected to maintain and keep their road or parts thereof, and the bridges over the streams crossing said road, in good order and repair, by erecting and maintaining permanent bridges over all the waters crossing said road, wherever the same were found necessary, by maintaining said road sixty feet wide and eighteen feet at least thereof an artificial road, solid, durable, and even to the surface by bedding the same with wood, stone, sand or gravel, a sufficient depth to secure a good foundation to the same, and by maintaining the said road faced with gravel or stone pounded or other small hard substance in such manner as to secure a firm and, as near as the materials would reasonably admit, an even surface, then their verdict should be for the plaintiff.

To the giving of which instruction the defendant objected, but the court overruled the said objection and granted the instruction as asked by the plaintiff. To the granting of which instruction by the court the defendant prayed leave to except, and that the court would sign and seal this its bill of exceptions, which is accordingly done on this 8th day of April, 1862.

J. P. P. R. N. MARTIN. [SEAL.]

And thereupon the said defendant, by its attorney aforesaid, prays an appeal from the judgment of the court here so as aforesaid rendered to the court of appeals to be held for the Western Shore of the State of Maryland, and it is granted.

Whereupon the said defendant files in court here a certain writing obligatory, commonly called an appeal bond, which is in the words and tenor following, to wit:

Know all men by these presents that we, Samuel M. Shoemaker and Moore N. Falls, of the city of Baltimore, are held and firmly bound unto the State of Maryland in the full and just sum of five hundred dollars, to be paid to the said State, its certain attorney and assigns, to the payment whereof, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals and dated this fourteenth day of May, eighteen hundred and sixty-two.

Whereas the said State did obtain judgment against the president, man-

agers, and company of the Washington and Baltimore Turnpike Road
34 Company, at the January term of the superior court of Baltimore City, from which judgment the said defendants have appealed to the court of appeals:

Now the condition of the above obligation is such that if the said defendants shall not cause a transcript of the record and proceedings of the said superior court to be transmitted to the court of appeals within the time required by law, and prosecute the said appeal with effect, and also satisfy and pay to the said State, in case the said judgment shall be affirmed, as well the damages and costs adjudged in the superior court aforesaid, as also all damages and costs that may be awarded by the court of appeals aforesaid, then the said bond to be and remain in full force and virtue; otherwise, to *of* no effect.

Witness: JAMES BOYCE. S. M. SHOEMAKER, [SEAL.]
M. N. FALLS. [SEAL.]

Which said bond is thus endorsed, to wit:
17th May, 1862, bond approved. R. N. MARTIN.

We accept the within bond as sufficient.
NEILSON POE,
J. P. POE, *for State of Maryland.*

It is thereupon ordered by the court here that a transcript of the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the court of appeals to be held for the State of Maryland, and the same is transmitted accordingly.

Test: GEO. E. SANGSTON, *Clk.*

In testimony that the foregoing is a full and true transcript, taken from the record of proceedings of the superior court of Baltimore City in the therein entitled cause, I hereto subscribe my name, and affix the seal of said court, this 21st day of March, A. D. 1862.

[L. S.] GEO. E. SANGSTON,
Clk superior court Balto. City.

And now come into the court of appeals here, as well the said the president, managers, and company of the Washington and Baltimore turnpike road, by George W. Dobbin, esq., its attorney, as the said the State of Maryland, by J. P. Poe, Wm. Price, and R. J. Gittings, esq'r's, its attor-
35 neys, and thereupon, on motion of the said the State of Maryland, by its attorneys aforesaid, it is ruled by the court here that the said the president, managers, and company of the Washington and Baltimore turnpike road assign the errors in the record of proceedings aforesaid, or in the giving the judgment aforesaid, so as aforesaid brought before the court of appeals here, for correcting the errors supposed to be therein, or judgment by the court of appeals here will be entered against it in default thereof. And the said the president, managers, and company of the Washington and Baltimore turnpike road, by its attorney aforesaid, says that in the record of proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that judgment aforesaid on the plea aforesaid given was given for the said the State of Maryland against the said the president, and managers, and company of the Washington and Baltimore turnpike road, when by the law of the land that judgment ought to have been given for the said the president, managers, and company of the Washington and Baltimore turnpike
36 road against the said the State of Maryland; therefore in that there is manifest error, and it prays the judgment aforesaid, for that error,

and others in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void, and that it, the said the president, managers, and company of the Washington and Baltimore turnpike road, may be restored to all things which it hath lost by occasion of the said judgment, and that the said the State of Maryland may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here that the said the State of Maryland join in the errors by the said the president, managers, and company of the Washington and Baltimore turnpike road above assigned in the record of proceedings aforesaid, or judgment by the court of appeals here will be rendered against it in default thereof. And the said the State of Maryland, by its attorneys aforesaid, says there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid, and it prays that the court of appeals here will proceed to the
37 examination as well of the record of proceedings aforesaid as the matters aforesaid by the said the president, managers, and company of the Washington and Baltimore turnpike road above for error assigned, and that the said judgment may be in all things affirmed, and so forth. But because the court of appeals here are not advised what judgment to give of and upon the premises, day therefore is given to the parties aforesaid, before the court of appeals here, until the first Monday in December next, to hear the judgment of the court of appeals here of and upon the premises, for that the court now here thereof are not advised, and so forth. And now at this day, to wit, the said first Monday in December, being the first day of the said month, in the year of our Lord one thousand eight hundred and sixty-two, come again into the court of appeals here the parties aforesaid by their attorneys aforesaid. Whereupon as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said the president, managers, and company of the
38 Washington and Baltimore turnpike road above for errors assigned, being seen and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears to the court of appeals here that there is no error in the record of proceedings aforesaid, nor in the giving of the judgment aforesaid. Therefore it is considered by the court of appeals here that the judgment aforesaid, given in form aforesaid, be in all things affirmed and stand in full force and effect, the said causes for error above assigned and alleged in anywise notwithstanding. And it is further considered by the court of appeals here that the said the State of Maryland have execution against the said the president, managers, and company of the Washington and Baltimore turnpike road, as well for the costs and charges aforesaid, adjudged unto the State of Maryland in the said superior court of Baltimore City, as also the sum of eighty-two dollars and sixty-one cents adjudged unto the said the State of Maryland by the court of appeals here on its assent for its costs and charges which it
39 hath sustained by occasion of the delay of the execution of the judgment aforesaid, by pretext of the prosecution of the said appeal, by the said the president, managers, and company of the Washington and Baltimore turnpike road, for the correcting of errors of and upon the premises as aforesaid, prosecuted, &c.

And afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and sixty-two, the said president, managers, and company of the Washington and Baltimore turnpike road files in the court of appeals here its petition, which is in the words following, to wit:

To the chief justice of the Supreme Court of the United States:

The petition of the president, managers, and company of the Washington

and Baltimore turnpike road respectfully showeth that in a suit in the superior court of Baltimore City, wherein the State of Maryland was plaintiff, and your petitioners defendants, the pleas, especially the second and
40 fifth pleas, drew in question the construction of a clause of the constitution of the United States, and the validity of authority exercised under the State of Maryland on the ground of its being repugnant to the constitution of the United States. But to all the pleas demurred to, the demurrers were sustained and like opinions were given at the trial of the general issue, and the judgment of the said superior court of law has been affirmed by the court of appeals for the State of Maryland, whereby there is final judgment in the suit in the highest court of the State in which a decision in the suit could be had, and the decision is in favor of the validity of the authority so exercised under the State, and is against the right claimed by your petitioners under such clause of the constitution of the United States. Your petitioners desire that the said judgment may be re-examined in the Supreme Court of the United States, and to that end pray a writ of error with a citation according to the act of Congress in such case provided.

41 Although it may not be incumbent on your petitioners to make at this time an assignment of errors, yet as the court of appeals of Maryland, in its opinion, cites the cases of the Charles River Bridge *vs.* Warren River Bridge, 11 Peters, 420, and the Washington and Baltimore Turnpike Road *vs.* Balt. and Ohio R. R. Co., 10 Gill & G., 292, it may not be improper to observe that to hold the pleas good would, your petitioners are advised, be nowise inconsistent with those cases. One who is absolute owner of a tract of land on which there is a mill and a stream of water to its wheels, though he had taken from another a covenant to work the mill, might construct another mill and put it in operation, and divert to the second mill the water which had before run to the first. But he could not in any court of justice sustain a claim founded on a breach which he himself had by such diversion caused. For the principle is that "if the obligee himself be the cause that the obligation cannot be performed, this is no forfeiture, for it is his own act." 5 Venabs., 246, tit. conviction, pl. 23. And this principle equally applies whether the proceeding be by an individual or by
42 the king, the state, or the people, the rule as to what is a sufficient performance or sufficient excuse for non-performance being the same in all cases, and governing when the proceeding is by a *scire facias* or information in the nature of a *quo warranto*, just as much as any other case. (Thompson *vs.* the People, 23 Wend., 586.)

Surely, the right claimed by the defendants under the constitution of the United States could be effectually set up against a statute of the State of Maryland, which in plain and direct terms either repealed our charter or prohibited tolls from being recovered on the turnpike. Suppose that in the latter case that after taking from the company the means of keeping its road in good order and repair, the State had, upon the ground of its not being kept in good order and repair, proceeded by *scire facias* to vacate and annul the charter, might we not well say that, under such circumstances, to forfeit the charter would be to impair the obligation of the contract, and take private property for public use without just compensation? The obligation of the contract is impaired by a law of the State, when, by
43 means of an authority exercised under the law, there is, without our consent, taken from us what we were entitled to under the contract. What the company was entitled to under the contract with the State is taken away when the State, through one department of its government, deprives the compaay of the means of keeping its road in order, and then through another department pronounces judgment of forfeiture against

the company for not keeping it in order. Such a judgment would be forbid by the first principles of justice as well as by the constitution of the United States; and if after taking from the company its whole income, the State would have no ground to complain of it for not keeping its road in order, neither had it any better ground of complaint when it has taken from the company part of its income, and with the remainder the road cannot be kept in any better order than it now is. If the former would not be consistent with the constitution of the United States, neither would the latter, and the case is still stronger in view of the allegations as to the demise
44 in the 5 plea. Nor will this doctrine require the existence of roads impassable and dangerous, or prevent better improvements either by the State herself or by another company. (Boston Water Power *vs.* Boston and Worcester Railroad, 23 Pick., 393; Central Bridge Corp. *vs.* City of Lowell, 4 Gray, 481.) As the supreme court of Connecticut has said, "there is a conservative principle by which the improvement may be made and good faith preserved. It is this: that private property may be taken for public use upon compensation made." (Enfield Toll Bridge Co. *vs.* Hartford and New Haven Railroad Co., 17 Conn., 58–9.) Notwithstanding there was an information in the nature of a *quo warranto*, the court would not, when there was no provision for compensation, allow the charter to be invaded in Washington Bridge Co. *vs.* the State, 18 Conn., 53.

The petitioners above named by—

CON. ROBINSON, *their Counsel.*

Dec'r 24th, 1862.

On the back of which said petition is the following endorsement, to wit: "Mr. Carroll will issue writ of error according to the prayer of the within petition."

R. B. TANEY,
C. J. of S. Ct of the U. States.

Dec'r 26th, 1862, Washington.

45 And thereupon the said president, managers, and company of the Washington and Baltimore turnpike road, by its attorney aforesaid, produces to the court of appeals here the writ of the United States for the correction of errors of and upon the premises, commanding the record of the proceedings and judgment last aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, which said writ is in the words following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the president, managers, and company of the Washington and Baltimore turnpike road, appellants, and the State of Maryland, appellee, wherein was drawn in ques-
46 tion the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the constitution, treaties, or law of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-

struction of a clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said the president, managers, and company of the Washington and Baltimore turnpike road, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties
47 aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-two.

WM. THOS. CARROLL,
Cl'k of the Supreme Court of the United States.

Allowed by—

R. B. TANEY,
Chief Justice of the Supreme Court, U. S.

48 And the president, managers, and company of the Washington and Baltimore turnpike road, on the day and year last aforesaid mentioned, produces to the court here the writ of error bond relating to the writ of error aforesaid, which said bond is in the words following, to wit:

Know all men by these presents that we, George Mattingly and John A. Peak, are held and firmly bound unto the State of Maryland in the full and just sum of five hundred dollars, to be paid to the said State of Maryland, her certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents; sealed with our seals, and dated this twenty-sixth day of December, in the year of our Lord one thousand eight hundred and sixty-two. Whereas lately at a court of appeals of the State of Maryland, held for the said State, in a suit depending in said court between the president, managers, and company of the Washington and Baltimore turnpike road, appellants, and the said State of Maryland,
49 appellee, judgment was rendered against the said president, managers, and company of the Washington and Baltimore turnpike road, and the said president, managers, and company of the Washington and Baltimore turnpike road having obtained a writ of error and filed a copy thereof in the clerk's office of *of* the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Maryland, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next: Now the condition of the above obligation is such that if the said president, managers, and company of the Washington and Baltimore turnpike road shall prosecute their writ of error to effect, and answer all damages and costs if they

fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE MATTINGLY. [SEAL.]
JOHN A. PEAK. [SEAL.]

Sealed and delivered in the presence of—
R. B. TANEY.

50 Approved by— R. B. TANEY.

And afterwards, to wit, on the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and sixty-three, the president, managers, and company of the Washington and Baltimore turnpike road files in court here a citation, which is in the words following, to wit:

The United States of America to the State of Maryland, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Maryland, wherein the president, managers, and company of the Washington and Baltimore turnpike road are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

51 Witness my name this 26th day of December, 1862.

R. B. TANEY, *Ch'f Just. Sup. C't, U. S.*

STATE OF MARYLAND, *Anne Arundel County, to wit:*

I hereby certify that on this twenty-eighth day of October, eighteen hundred and sixty-three, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the county aforesaid, personally appeared Mr. Bannon, and made oath on the Holy Evangely of Almighty God that he served the within citation on A. W. Bradford, governor of Maryland, on this twenty-eighth day of October, eighteen hundred and sixty-three, and delivered to him a copy of the same.

Sworn before— WM. R. THOMPSON, *J. P.* [SEAL.]

On the back whereof is the following, to wit:

Service of within acknowledged, Oct. 28th, 1863.

A. W. BRADFORD, *Gov'r.*

In pursuance whereof, and according to the form and effect of the act of Congress of the United States in such case made and provided, a transcript of the record and proceedings of the judgment last aforesaid, so as

52 aforesaid rendered, with all things concerning the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly, &c.

GEORGE EARLE,
Clerk Court of Appeals, Md.

STATE OF MARYLAND, *sct:*

I, George Earle, clerk of the court of appeals of the State of Maryland, do hereby certify that the aforegoing is truly taken from the record and proceedings of the court of appeals aforesaid.

In testimony whereof, I have hereunto set my hand as clerk, [SEAL.] and affixed the seal of the said court of appeals this second day of November, A. D. 1863.

GEORGE EARLE,
Clerk Court of Appeals of Md.

[5-ct. revenue stamp.]

53 Know all men by these presents that we, George Mattingly and John A. Peak, are held and firmly bound unto the State of Maryland in the full and just sum of five hundred dollars, to be paid to the State of Maryland, her certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-sixth day of December, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas lately at a court of appeals of the State of Maryland, held for the said State, in a suit depending in said court between the president, managers, and company of the Washington and Baltimore turnpike road, appellants, and the said State of Maryland, appellee, judgment was rendered against the said president, managers, and company of the Washington and Baltimore turnpike road, and the said president, managers, and company of the Washington and Baltimore turnpike road having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Maryland, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such that if the said president, managers, and company of the Washington and Baltimore turnpike road shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the the above obligation to be void; else to remain in full force and virtue.

(Signed) GEO. MATTINGLY. [SEAL.]
" JOHN A. PEAK. [SEAL.]

Sealed and delivered in presence of—
(Signed) R. B. TANEY. [SEAL.]

Approved by—
(Signed) R. B. TANEY. [SEAL.]

54 *Writ of error to judgment of the court of appeals for the State of Maryland.*

THE PRESIDENT, MANAGERS, AND COMPANY OF THE Washington and Baltimore Turnpike Road
against
THE STATE OF MARYLAND.

Assignment of error and prayer for reversal.

The said president, managers, and company, by their attorneys and counsel, say that on the face of the record it appears that in the said suit there is drawn in question the construction of a clause of the constitution of the United States and the validity of authority exercised under the State of Maryland, on the ground of its being repugnant to the constitution of the United States. The same is drawn in question by seven pleas, to which there were demurrers, especially by the second and fifth of the said pleas, and

the decision is in favor of the validity of the authority so exercised under the State and is against the right claimed by your petitioners under said clause of the constitution of the United States. And as immediately respects these questions of construction of the said constitution and validity of the said authority, the said president, managers, and company say there is error in sustaining the said demurrer, and in rejecting the evidence mentioned in the fifth bill of exceptions, and in giving the instruction mentioned in the sixth bill of exceptions, and in overruling the motion in arrest of judgment; and therefore the said court of appeals should not have affirmed but should have reversed the judgment of the superior court of Baltimore
55 City; and the said president, managers, and company now pray a reversal of the judgment of the said court of appeals.

The said president, managers, and company by—

GEORGE W. DOBBIN & CON. ROBINSON,
their Attorneys and Counsel.

Filed December 23, 1863.

In the Supreme Court of the United States.

December Term, 1865.

No. 118.

THE PRESIDENT, MANAGERS & CO.

OF THE

WASHINGTON AND BALTIMORE TURNPIKE ROAD,

vs.

THE STATE OF MARYLAND.

STATEMENT AND POINTS OF THE DEFENDANT IN ERROR.

STATEMENT.

THE facts in this case are, that the Plaintiffs in Error were incorporated in 1812, by the Legislature of Maryland, and authority given them to construct a Turnpike from the city of Baltimore to the District of Columbia. The charter was accepted, and the road built. In 1831, or thereabouts, the Baltimore and Ohio Railroad Company, under special authority also conferred upon them by the State of Maryland, constructed the Washington Branch Railroad, between the same *termini*.

In 1839 the Turnpike Company brought a special action on the case, against the Railroad Company, in Baltimore County

Court, upon the ground that the charter to the former, in 1812, was a contract between them and the State, which was impaired by the legislation authorizing the building of the Branch Railroad without proper compensation to them, and claiming damages for a violation of their vested rights.

The Court of Appeals of Maryland affirmed the judgment of the lower Court, in favor of the Railroad Company.

10 Gill & Johns., 392.

In 1860 the Legislature of Maryland passed a law directing the State's Attorneys of the city of Baltimore and of the counties traversed by the Turnpike, to institute proceedings in the name of the State against the Plaintiffs in Error, to ascertain whether their charter and corporate powers and franchises ought, by reason of non-user or abuser, to be declared to be vacated and annulled.

Acts of 1860, ch. 326.

In conformity with this law, a writ of *scire facias* was sued out of the Superior Court of Baltimore City, in the name of the State against the Turnpike Company, and, after a full hearing, a verdict was rendered, that the Plaintiffs in Error had "*wilfully, and for a long time, neglected and failed to keep their said road, or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as are required by law, in violation of their chartered obligations, and in disregard of the rights of the State, and to the great injury, inconvenience and detriment of the public traveling upon said road.*" (Record, 17.)

A motion in arrest of judgment was overruled, (Record, 17,) and a judgment of ouster finally entered, vacating and annulling the corporate powers and franchises of the Company. (Record, p. 17.)

Upon appeal, this judgment was affirmed.

19 Md., 239.

The case is brought here upon a writ of error to the Court of Appeals of Maryland.

The reasons assigned are that in the "*suit there is drawn in question the construction of a clause of the Constitution of the United States and the validity of authority exercised under the State of Maryland, on the ground of its being repugnant to the Constitution of the United States.*"

POINTS.

Upon the aforegoing statement, it will be contended on behalf of the Defendant in Error:

1st. That this Court has no jurisdiction in the case, if the repugnance alleged to exist is to that clause of the fifth amendment to the Constitution of the United States which declares that "private property shall not be taken for public use without just compensation," because that amendment is not intended to operate, and does not operate in restraint of State, but exclusively of Federal action.

Barron vs. The Mayor, &c., 7 Peters, 243.

2d. That this Court, under their well settled practice, will not review the decision of the Court of Appeals of Maryland, upon the construction and application of a clause of her own constitution containing a provision similar to that of the fifth amendment, but will adopt that decision as final and conclusive upon the question.

Leffingwell vs. Warren, 2 Black, 599—603, and Cases there cited.

Gelpcke vs. Dubuque, 1 Wallace, 206.

3d. That should this Court take jurisdiction of this case and examine into the correctness of the decision of the Court of Appeals of Maryland, there is no error in that decision as violating the provisions alluded to, either in the fifth amendment to the Constitution of the United States, or in the Constitution of Maryland.

In other words, that there has been in this case no taking whatever of private property for public use, without just compensation.

4th. That the Plaintiffs in Error had no contract with the State of Maryland which disabled her from authorizing, by appropriate legislation, the building of the Washington Branch Railroad, and from directing these proceedings to be instituted, but that she had a perfect legal right to do both.

Washington and Baltimore Turnpike Company vs. Baltimore and Ohio R. R. Co., 10 G. & J., 392.

Charles River Bridge vs. Warren Bridge, 11 Peters, 536–553.

Richmond R. R. Co. vs. Louisa R. R. Co., 13 Howard, 81.

5th. That conceding *ex gratiâ* that the act of 1812, incorporating the Turnpike Company, created a contract between them and the State, such contract is not impaired by the legislation authorizing the building of the Washington Branch Railroad, or that directing the institution of this suit, whether taken separately or together.

That consequently the judgment should be affirmed.

A. RANDALL,
NEILSON POE,
For Defendant in Error.

6 Randall

Murphy & Co. Printers, Balt

Supreme Court of the United States.

DECEMBER TERM, 1865. No. 118.

WASHINGTON & BALTIMORE TURNPIKE CO., Pltffs in Error,

Against

THE STATE OF MARYLAND, Defendant in Error.

Writ of Error to a judgment of the Court of Appeals of Maryland, affirming a judgment whereby it was considered that the charter granted the turnpike company should be vacated and annulled.

ABSTRACT OF PLAINTIFFS IN ERROR.

Supreme Court of the United States.

DECEMBER TERM, 1865. No. 118.

WASHINGTON & BALTIMORE TURNPIKE CO., Pltffs in Error,

Against

THE STATE OF MARYLAND, Defendant in Error.

Writ of Error to a judgment of the Court of Appeals of Maryland, affirming a judgment whereby it was considered that the charter granted the turnpike company should be vacated and annulled.

ABSTRACT OF PLAINTIFFS IN ERROR.

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1. The General Assembly of Maryland, at its session of 1812--13, passed an act to incorporate a company to make a turnpike road from the District of Columbia to the City of Baltimore, (ch. 78 of Sess. Acts,) which was accepted, and the stockholders incorporated and the road made in pursuance of the provisions of the act. (Rec. p. 7.) After the turnpike road was perfected from the District of Columbia to the City of Baltimore, and had been examined, approved, and licensed in the manner prescribed by the 15th section of the charter, (Rec. p. 9,) the General Assembly of Maryland passed an act of the 28th of February, 1829, to incorporate the Baltimore and Ohio Railroad Company, and subscribed for a large amount of the stock of that company. Without the consent, and against the will of the turnpike company, there was, under the authority of an act passed on the 22d of February, 1830, by the General Assembly of Maryland, and under the authority of an act passed on the 2d of March, 1831, by the Congress of the United States, constructed and put in operation, a branch railroad from the

Baltimore and Ohio railroad to the City of Washington; and from the time the same was put in operation until the present time, there has, in every year, been transported on said branch railroad, a large number of persons who, and a large amount of property which, had the said branch railroad not been put in operation, would have passed on said turnpike road; and for such transportation said railroad company has received and is receiving large sums of money. And said branch railroad has been constructed, not only under the authority of the State of Maryland, but in great part with the State's own money, to wit: to the amount of $500,000, for which, under said act of 22d of February, 1830, it has a separate and distinct stock; and also in great part for the State's own profit. And not only has the State a profit as a stockholder, but under an act of the General Assembly, passed on the 4th of March, 1833, there has been paid, and is still paid, to the treasurer, for the use of the State, one-fifth of the whole amount received for the transportation of passengers on said branch railroad; and said branch railroad is, in great part, under the State's own management. (Rec. p. 9, 10.)

2. At the time the General Assembly of Maryland was legislating for the construction of the railroad mentioned in the act of the 22d of February, 1830, the turnpike company did remonstrate and protest against the same, and did predict and declare that the consequence of the proposed action on the part of the State, in constructing said railroad, would be to reduce the tolls and revenues of said turnpike road so low that the whole thereof would be insufficient to keep said turnpike road in good and proper condition and repair; whereupon the General Assembly, professing to recognize the importance of preserving the turnpike road in its then state of usefulness, did, in the 4th section of said act, enact that the turnpike company should be allowed to subscribe for, and furnish a certain portion of the funds to be used in the construction of said railroad—the dividends, in virtue of which subscription, were to be applicable in the first place, to put and keep said turnpike road in good and sufficient repair. Even if the privilege of so subscribing had been in any sense a just and adequate or proper mode of keeping said turnpike road in repair, yet the whole of the capital of the turnpike company had been expended in the construc-

tion of said turnpike road, and they had not the means of subscribing to said railroad; and, moreover, under an act of the General Assembly of Maryland, passed on the 9th of March, 1833, the right to make such subscription ceased and determined within six months after the passage of the last mentioned act. (Rec. p. 10.)

3. On the 10th day of February, 1839, the General Assembly of Maryland passed an act whereby—after reciting that there was then pending in Baltimore County Court an action brought by the Washington and Baltimore Turnpike road against the Baltimore and Ohio Railroad Company, and that it was of great importance to said companies, and of public interest that the questions involved in said action should be speedily settled—the Court of Appeals of the Western Shore of Maryland, was authorized and directed to hear any appeal that might be taken from the decision in said cause at its first term; thus, by said act of the General Assembly of Maryland, admitting that said turnpike road was then maintained and kept in sufficiently good order and repair, and that no sufficient cause then existed for vacating and annulling the chartered and corporate powers and franchises.

4. The State of Maryland by the act of the General Assembly of said State, and the conduct of its officers has admitted that until 1858, said turnpike road was mantained and kept in sufficiently good order and repair; and that until the time last mentioned no sufficient cause existed for vacating and annulling the chartered and corporate powers and franchises; and by such admission, stockholders in said turnpike company, were at the time last mentioned enabled to make an agreement to sell, and other persons were at the same time induced to make an agreement to purchase at a large price, to wit: the price of $16.000, 1540 shares of stock in said turnpike company and pursuant to said agreement, to wit: on the 1st of October, 1858, said price was paid, and said 1540 shares of stock transferred to the purchasers thereof; and said transfer was made, and the purchase money paid upon the faith of the admission by the State of Maryland, that while said turnpike road was maintained and kept in as good order and repair as it was at the time of said agreement to purchase, the State of

Maryland would consider that no sufficient cause existed for vacating and annulling the chartered and corporate powers and franchises.

5. The General Assembly of Maryland, having by an act of the 18th of March, 1833, authorized the turnpike company to charge tolls on steam carriages travelling on their road, it was after the purchase and transfer mentioned in the 4th paragraph, to wit: at a meeting of the stockholders in said company, held on the 5th of October, 1858, resolved, that the President and Managers be authorized to convert the turnpike road into a plank road adapted to horse-power or to both horse-power and steam carriages, as they may deem most advisable, and to procure, by loan or a pledge of the property, income, privileges and franchises of the corporation, the amounts of money that they may find requisite to the object; and at a meeting of the board of directors, held on the 4th of Oct., 1859, it was resolved, that the President be authorized to have a new bridge constructed at Gwynn's Falls, and to have made, in addition to ordinary repairs, such further renewals of bridges on the line of the turnpike as might seem to be required; and it was further resolved, that for these purposes the President be authorized to borrow, on the credit of the company, at interest not exceeding six per cent., the sum of $3,000, or such portion of the amount as he might find to be required. Pursuant to these resolutions, the President did have a new bridge constructed at Gwynn's Falls, and did have, in addition to ordinary repairs, some further renewals of bridges on the line of the turnpike; and for these purposes he borrowed, on the credit of the company, in the fall of 1859, from certain persons, a large sum of money, to wit, the sum of $2,000; and the whole of this sum was expended in constructing said new bridge, and in such further renewals; and said money was borrowed and lent upon the faith of the tolls and duties which the President and Managers of the turnpike road are authorized to demand and receive for passage upon and along said road, and in the confidence and upon the understanding and agreement that the President and Managers, under the 31st section of the charter, would, when required so to do, grant, demise and to farm let to the persons from whom said money was borrowed, the said tolls and duties for a term of seven years, under the reservation and condition that of said tolls

and duties there should first be applied, to keep said road in repair, so much as might be necessary for that purpose, and then the surplus be applied to repay said $2,000, with interest thereon.

Notwithstanding the efforts of the turnpike company to keep their road and bridges in good order and repair, (efforts greater after than before the transfer of October, 1858,) there seem to have been memorials to the General Assembly of Maryland, representing that the charter or franchise of the company had been forfeited by wilful and long continued neglect to keep their road, or parts thereof, in such good order and repair as is required by the act of 1812; and in 1860, an act of Assembly was passed directing the State's attorneys for the City of Baltimore, Baltimore county, Anne Arundel county, and Prince George county, to institute proceedings, in the name of the State, against the turnpike company, to ascertain whether the charter and corporate powers and franchises of said company ought, by reason of non-user or abuser, to be declared to be vacated and annulled.

On the 12th of May, 1860, a writ of *scire facias* was issued reciting the 13th section of the act of 1812, and suggesting that the company "have *wilfully*, and for a long time, neglected and failed to keep their said road, or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as are required by said act, and by said 13th section especially;" and requiring notice to be given to the company to appear before the Superior Court of Baltimore City to show why their charter and corporate powers and franchises ought not to be declared to be vacated and annulled.

To this writ the defendants, (under the Code of Maryland, p. 506–7, art 75,) pleaded as follows:

The first plea, after setting forth the matters stated in the first paragraph of this abstract, alleges, that although before and until transportation on the branch railroad, the turnpike road was, out of the money collected and received by the toll-gatherers, maintained and kept in the same good order and repair in which it was at the time it was examined, approved and licensed, yet, through and by means of the transportation on said branch railroad, the defendants have been, and still are deprived of so much of the income which, but for such transportation, would have been received by them,

that it is impracticable for them, with all the income that they receive from such persons and property as pass on the turnpike road, to maintain and keep said turnpike road in any better order and repair than it now is; and so the defendants say that they have not, as in said writ of *scire facias* is suggested, *wilfully*, and for a long time, neglected and failed to keep their said road, or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as is required by the act of 1812; but that if there has been such failure, it has arisen from the act of the State herself, and by and through her own means. (Rec. p. 10.)

The second plea, after stating what is set forth in the second paragraph of this abstract, alleges that the effect of the transportation on the railroad was to deprive the Turnpike Company of much income, which, had said railroad not been constructed, might and would have been received by them; and, although without some just compensation for the income of which they were so deprived, they could not maintain and keep said turnpike road in any better order and repair than it now is, yet no such compensation has been made; and so the defendants say that they have not, as by said writ of *scire facias* is suggested, *wilfully* and for a long time neglected and failed to keep their said road or parts thereof, and the bridges over the streams crossing said road, in such good order and repair as is required by the act of 1812; but that if there has been such failure, it has arisen from the act of the State herself, in depriving the Turnpike Company of much income as aforesaid, and making to them no compensation therefor; and under such circumstances to vacate and annul their chartered and corporate powers and franchises would be contrary to the Constitution of the State of Maryland and to the Constitution of the United States. (Rec. p. 10, 11.)

The third plea, after stating what is set forth in the third paragraph of this abstract, avers that, during the whole of the year next preceding the commencement of this suit, the turnpike road has been maintained and kept in as good order and repair as it was at the time of the passage of the act of the 10th of February, 1839.

The fourth plea, after stating what is set forth in the fourth paragraph of this abstract, avers that soon after said transfer, the turnpike road was put in better order and repair, and during the whole of the year next preceding the

commencement of this suit the said turnpike road has been in better order and repair than it was at the time of said agreement to purchase.

The fifth plea, after stating what is set forth in the fifth paragraph, avers that not only during all the time which has elapsed since the said money was so borrowed, but during all the time which has elapsed since the agreement to purchase mentioned in the fourth plea, the whole of said tolls and duties have been applied to keep said road in repair, and there now remains due and unpaid to the persons from whom said money was so borrowed the whole of said $2000, with interest thereon, and to repay the same the defendants have no other means besides the said tolls and duties: and if such security as is afforded by said tolls and duties shall now, against the consent of the persons from whom said money was borrowed, be taken away, it will, in effect, be taking their property for public use without just compensation, contrary to the Constitution of the State of Maryland and contrary to the Constitution of the United States.

The sixth plea, after setting forth the 31st section of the charter, avers that after the several matters and things set forth in their plea for the purpose of keeping their turnpike road in repair and to rebuild a bridge thereon, in consideration of the sum of $2000, to them paid on the 14th of November, 1859, by certain persons, the President and managers did grant and demise to those persons the tolls and duties to which they are entitled, and authorized to demand and receive for passage on, along and upon said road for the period of seven years from said 14th of November, 1859; those persons covenanting to apply said tolls and duties to the necessary expenses of managing and keeping said road in repair, and the surplus, if any, to the use of those persons; so that the defendants say that they are not now possessed of said franchise, and that any condemnation of said franchise must be subject to the rights and property of those persons under the grant and demise.

The seventh plea alleges that, although the General Assembly of Maryland intended, and in the 19th, 20th and 21st sections of the act of 1812 provided, there should be tolls yielding to the stockholders in nett profits not less than 10 per cent. per annum, yet no such profits, nor any profits whatever, have been divided among the stockholders during the time which has elapsed since the agreement to

purchase mentioned in the fourth plea; but during the whole of that time all of the tolls and duties received for passage upon and along said road have been applied to maintain and keep said road in good order and repair. (p. 13.)

The eighth plea is founded on the code of Maryland, p. 397, art. 57, sec. 10. It is that the suit was not commenced within one year from the time of the alleged forfeiture set forth in the writ of *scire facias*. (p. 13.)

The ninth plea is the general issue of not guilty. (p. 13.)

The tenth plea is on the ground that this proceeding is a criminal information, and as such should have been instituted in the Criminal Court of Baltimore only, which is the only court which, under the Constitution of the State, has criminal jurisdiction within the city. (p. 15.)

The court sustained a motion to strike out the eighth plea, as not filed within the time required by the rules of court, and sustained demurrers to all the other pleas, except the plea of not guilty. (p. 15. 16.)

At the trial of the issue on this plea, there were bills of exceptions to opinions of the court: 1. Admitting a witness objected to as incompetent, (p. 18.) 2. Admitting evidence as to want of repair of turnpike road in parts thereof lying outside of the limits of the City of Baltimore, (p. 18.) 3. Admitting evidence as to want of repair of defendants' road existing more than one year before the commencement of this prosecution, (p. 18.) 4. As to a question proposed to be asked a witness, and which the court would not allow, (p. 19.)

To rebut the allegation that the defendant had *wilfully*, and for a long time, neglected and failed to keep its road in repair, and the evidence offered to sustain it, defendant offered to prove that in building said road, it had expended its whole capital of $100,000, and $40,000 more, derived in part from the tolls of a portion of the road then opened, and in part from additional subscriptions by its stockholders, and that it had no other property but its franchise to take tolls from persons using the road, and that defendant expends the entire receipts of the road in its repair, and that any want of repair arises solely from want of pecuniary ability; and in order to show the cause of such pecuniary inability, proposed to show, by evidence, to the jury, the amount of the receipts and expenditures of the road prior to the opening and use

of the Washington Branch railroad, and the falling off of the receipts thereafter, and the causes thereof, and to read to the jury the acts of Assembly of Maryland of 1827, ch. 170, sec. 15; and of 1828, ch. 139, sec. 20; and of 1830, ch. 158, sec. 4, to show the action of the State with reference to the defendant. But the court refused to let the evidence go to the jury; and its refusal is the subject of the fifth bill of exceptions. (p. 19, 20.)

The sixth bill of exceptions is to the following instruction: "If the jury believe from the whole evidence in the case, that the defendant had, *at the time of the passing of the act of* 1860, ch. 326, given in evidence, failed and neglected to maintain and keep their road, or parts thereof, and the bridges over the streams crossing said road, in good order and repair, by erecting and maintaining permanent bridges over all the waters crossing said road, wherever the same were found necessary, by maintaining said road 60 feet wide, and 18 feet, at least, thereof, an artificial road, solid, durable and even to the surface, by bedding the same with wood, stone, sand or gravel, a sufficient depth to secure a good foundation to the same, and by maintaining the said road faced with gravel or stone pounded, or other hard substance, in such manner as to secure a firm, and as near as the materials would reasonably admit, an even surface, then their verdict should be for the plaintiff." (P. 20.)

Under this instruction the jury found a verdict for the plaintiff. (P. 17.) The defendant moved in arrest of judgment. (P. 17.) But the motion was overruled, and judgment entered that the charter granted to the defendants "be vacated and annulled; that the said corporate body be ousted, and their corporate rights, powers, privileges and franchises cease and be void." (P. 17.)

There was an appeal to the Court of Appeals. (P. 20.) But that Court affirmed the judgment. (P. 22.)

Grounds before the State Courts.

The grounds before the State courts were numerous. It was contended that under the charter of 1812, which prescribes a particular remedy, no remedy should be taken but that prescribed by the charter; *Stevens vs. Evans*, &c., 2 Burr., 1159; *Underhill vs. Ellicombe*, McClel. & Y. 450; that according to sec. 26th of the charter, the proceeding should

have been by information to a justice of the peace; 2 Hale's P. C., 171; *Rex vs. Buck*, 1 Str., 679; *Rex vs. Wright*, 1 Burr., 545; *Browne vs. Com.*, 3 S. & R., 274; *Com. vs. Evans*, 13 Id., 426; *Com. vs. Breed*,* 4 Pick., 464–'5; that though the charter be regarded as creating an obligation, yet as it provided for enforcing performance in a specified manner, that performance should only have been enforced in that manner; *Doe. vs. Bridges*, 1 Barn. & Adol. 859, 20 Eng. C. L.; *Dundalk R. Co. vs. Tupster*, 1 Adol. & El., N. S. 667, 41 Eng. C. L.; *Stevens vs. Jeacocke*, 11 Adol. & El., N. S. 741, 63 Eng. C. L.; *Marshall, &c., vs. Nicholls*, 18 Adol. & El., N. S. 882, '83, Eng. C. L.; that the enforcement was to be in the form of criminal proceeding and as punishment for an offence; *State of Maryland vs. Balt. & Ohio R. Co.*, 3 How., 552; that if, however, other remedy was proper to enforce obedience, it was by *mandamus*; Bull, N. P. 199; *King vs. Severn & Wye. Railway Co.*, 2 Barn. & Ald. 646; *The Queen vs. Bristol Dock*, 2 Adol. & El., N. S. 64, 42 Eng. C. L.; Grant on Corpo. 308; and not by a *quo warranto* or *scire facias*; that the judgment in the latter part of the reign of Charles II., upon an information in the nature of a *quo warranto* (*Rex vs. Mayor, &c., of London*, 2 Show. 279) found support in statutes which do not exist in Maryland, to wit: the statute *de quo warranto*, passed 6 Edw. I, (1278,) of which *Lord Coke* treats in 2 Inst., 279, 280, and the statute 28 Edw. III., c. 10, enacting that, "on the first offence, the city of London shall forfeit 100 marks; on the second 2000; and for the third the liberty and franchise of the city of London shall be taken into the King's hands," 2 Show. 678; that although this is referred to by the Court as authority for its judgment, that judgment was greatly disapproved. See 6 Hume's Eng., ch. 69, p. 258; 2 Hallam's Const. Hist., 611, 612; 3 Steph. Com., 148; 2 Campbell's Lives of Chief Justices, ch. 20, p. 41, and ch. 21, p. 65; that the judgments in this and other like cases, and the new charters granted by Charles II., were declared illegal and void by all three departments of the Government, to wit: by a proclamation of James II., nine days before the landing of King William, *Newling vs. Francis*, 3 T. R., 196; then by a statute of 2

*In this case the Court said: "The penalty for any unnecessary delay in raising the draw is fixed by the statute, and any neglect of this kind would subject the owner to this penalty, but would not operate as a forfeiture of the franchise." 4 Pick., 464–'5.

William & Mary, Sess. 1, ch. 8; and by the House of Lords sitting as an appellate tribunal, Skinner, p. 310. See also *Eyres*, J., in S. C (*King vs. Mayor, &c., of L.,*) 1 Show, 278; *Sir James Smith's* case, 4 Mod. 52; *Pepper vs. Mayor, of Drogheda*, 2 Brown Par. Cas., p. 321 of Tomlin's edi.; *The King vs. Amery*, Ib., 336*; that although the House of Lords, (in accordance with the unanimous opinion of the Judges who advised them) held that the prior charter remained in force, and that the new charter granted by Charles II, was void *ab initio*, (2 Brown's Par. Cas., p. 336 of Tomlin's edi.,) and therefore reversed the judgment of the King's Bench, in the *King vs. Amery*, 1 T. R., 575; 2 Ib., 515, yet of the fact of such reversal, adverted to by the Supreme Court of the U. S., in *Bacon, &c.. vs. Robertson, &c.*, 18 How., 484, notice has not always been taken; and that judgment of the King's Bench has exerted too much influence upon text writers, 18 How., 484; that if, however, there could be a judgment vacating and annulling the corporate powers and franchises, it could only be upon a proceeding of which the Superior Court of Baltimore City had no jurisdiction, to wit: upon information in the nature of a *quo warranto*;† *Com. vs. Union Ins. Co.*, 5 Mass., 232; *Terrett, &c., vs. Taylor, &c.*, 9 Cranch, 51; *Com. vs. James River Co.*, 2 Va. Cas., 190; *People vs. Bank of Niagara*,‡ 6 Cow., 196; *Com. vs. Breed*, 4 Pick., 464; *Atto. Gen'l vs. Petersburg and Roanoke R. R. Co.*,‖ 6 Iredell, 456;

*As to the information in the nature of a *quo warranto*, further legislative provision was made by the statute of 9 Ann. C. 20, (2 Selw. 1190; which, however, has not been enacted in Maryland. It appears that in England, even after that statute, judgment of ouster was not a matter of course. *Rex vs. Taylor*, 2 Barnard. 238, 280, 316, 320. It certainly could not have been before that statute. Sir *Dudley Ryder's* view of the law as it was before that statute, is stated in *Rex vs. Ponsonby*, Sayer, 245; the judgment in which case was affirmed in the House of Lords. 2 Brown's Par. Cas., p. 319 of Tomlin's edi.

† Had this, which is "a criminal method of prosecution," (3 Bl. Com., 263,) been resorted to, the case could not have been in the Superior Court of Baltimore City; in such a case in that court, the tenth plea (p. 15) would have been a valid defence.

‡ This information had to sustain it, (besides the stringent provision in the 10th section of the charter,) the general statute of 1825, sess. 48, ch. 325, sec. 7, from which is taken the provision in 2 R. S., part 3, art. 2, ch. 9, sec. 39, p. 583, of 1st, p. 483 of 2d edi. Other New York cases rest also on 2 R. S., 483, sec. 39. See *People vs. Kingstown and Middletown R. Co.*, 23 Wend., 204.

‖ An information founded on the North Carolina act of 1831, Rev. Stat., ch. 26.

and not upon a *scire facias*, which is a writ founded on matter of record, to wit: to annul letters patent for an office, (*Rex vs. Eston*, 2 Dy., 198,) where they are enrolled in the court of chancery, and therefore matter of record, 4 Inst., 209, 88; 2 Bac. Abr., tit. *Scire facias* (C.) 3; 2 Wms. Saund., 72; or when there is an inquisition, *King vs. Rooks*, Cro. Car., 491; or where the *scire facias* is otherwise founded on a record, F. N. B., 184, note (a);* *Rex vs. Butler*, 3 Lev., 223; 2 Ventr., 344; that the opinion in the *King vs. Passmore*, 3 T. R., 244, though expressed not quite so carefully as it would probably have been if delivered after the reversal by the House of Lords of the judgment of the King's Bench, in the *King vs. Amery*, 2 T. R., 515, may, nevertheless, well be satisfied by applying it to the case of letters patent granted by the King; and there is no occasion to construe it—nor should it be construed—as in disregard of the distinction well established in England, between the case of a claimant under such letters patent† and the case of a corporation aggregate created by an act of the legislature; *Grant* on Corpo., p. 42, note (h.); also p. 307; Foster on *scire facias*, 272; *Bynner vs. Regina*, 9 Adol. & El., 553, 58 Eng. C. L.; that if construed as in disregard of that distinction, it would be nothing more than an *obiter dictum*, and upon no better foundation than this *dictum* rests the *dictum* of *Buchanan*, C. J., in *Canal Co. vs. Railway Co.*, 4 Gill & J., 121, unless, indeed, the act of the 18th of March, 1833, to regulate proceedings against corporations, was in force then as it was at the time of the decisions in the *Regents of University vs. Williams*, 9 Ib., 126, and in the *Board of Com. vs. The State*,‡ 9 Gill, 403; that the act of the 18th of March, 1833, not being retained in the code of Maryland, there is in this State no general statute under which to prosecute against a corporation created by act of the legislature such

* In 20 and 21 Car. 2, it is laid down that "in cases of fairs and markets, the party hath an interest given by the King which must be effectual. Therefore, the letters patent, to use on the same day, or near the former, may be repealed by *scire facias*." 2 Keb., 465. Such was *Butler's* case, 2 Ventr., 344.

† The nature of the common law judgment, "to compel the bringing in the letters patent which are in the hands of the grantee for cancellation," (*Reg. vs. Archipelago Co.*, 1 El. & Bl., 345, 72 Eng. C. L.) is inapplicable to an act of the legislature.

‡ In this case, by mutual consent, a *scire facias* was issued to try the alleged forfeiture.

a *scire facias* as lies at common law against one claiming under letters patent; that in the absence of any such general statute the act of 1860, ch. 326, which may be supposed to have been passed in view of the rule of England as to the authority of the Attorney General, (*Ibbotson's* case, Cas. Temp. Hardw, 261; *Rex vs. Carmarthen*, 2 Burr., 870; *The King vs. Ogden, &c.*, 10 Barn. & Cress., 230 ,21 Eng. C. L.; *Regina vs. Archipelago Co.*, 1 El. & Bl., 353, 72 Eng. C. L.;) and the understanding here that no such proceeding can be instituted but at the instance of the Government, (*Com. vs, Union Fire & Marine Ins. Co.*, 5 Mass., 230; *Wallace vs. Anderson*, 5 Wheat, 291,) would not be a sufficient foundation for the *scire facias*, even if it had properly alleged legal causes of forfeiture; but that here there was no sufficient allegation of such causes; *Bristol & Rensselaerville T. P. Co.*, 23 Wend., 231; (on 7th, 8th and 10th replications:) *Attorney General vs. Petersburg and Roanoke R. R. Co.*, 6 Iredell, 465; *Board of Com. vs. The State*, 9 Gill, 403; and that on the principle of going back to the first fault in the pleading, the Court on the demurrer should hold the *scire facias* insufficient, and for that reason give judgment for the defendants. 6 Iredell, 465.

It was further contended, that even if the *scire facias* showed a *prima facie* case, that case was, under the Code, (p. 397, art. 57, sec. 10,)* answered by the eighth plea, (p. 13;) and whether it was right to strike out that plea or not, yet, that on the general issue the plaintiff was to prove that the proceeding was, and the defendant might show that it was not, commenced within the year, (2 Wms. Saund. 63, note 6; Peake's Ev., ch. 5, sec. 1, 273-4; Stark. Ev., tit. *Penal Action*, part 4, p. 1123, 1128;) and therefore there was error in the opinion mentioned in the third bill of exceptions, (p. 11.)

It was further contended, that construing that provision of the Code in connection with the rule, that the State might waive any breaches, (*Com. vs. Ins. Co.*, 5 Mass.. 232; *People vs. Manhattan Co.*, 9 Wend., 383; *Kellogg vs. Union Co.*, 12 Conn., 19; *State of Maryland vs. Baltimore and Ohio R. R. Co.*, 3 How., 552; *Atto. Gen. vs. Petersburg R. R. Co.*, 6

* This section provides that "no prosecution or suit shall be commenced for any penalty or *forfeiture*, or any misdemeanor, except those punished by confinement in the penitentiary, unless within one year from the time of the offence committed."

Iredell, 469; *Board of Com. vs. The State*, 9 Gill, 404; *Erie & N. E. R. R. Co. vs. Casey*, 1 Grant, 278, 282, 483;) there was error in the judgment on the third plea, (p. 11;) and that error was yet more apparent on the fourth plea, (p. 11.) For a party may be estopped by matter of fact, though not in writing. Lit., sec. 667; Co. Lit., 352*a*; Com. Dig., tit. *Estoppel; Montefiore vs. Montefiore*, 1 W. Bl., 363, cited in 1 Brown's C. R., 548, and *Bowes vs. Foster*, 2 H. & N., (Excheq.) 788; *Crockett vs. Lashbrook, &c.*, 5 Monroe, 544; *Pickard vs. Sears, &c.*, 6 Adol. & El., 469, 33 Eng. C. L., 115; *Gregg vs. Wells*, 2 Per. & Dav., 236; 10 Adol. & El., 90, 37 Eng. C. L.; *Cox vs. Beard*, 3 Strobh., 367; *Freeman vs. Cooke*, 2 W. H. & G., (Excheq.) 663; *Jorden vs. Money*, 5 Ho. of L., 214; *Howard vs. Hudson*, 2 El. & Bl., 12, 75 Eng. C. L., 20 Eng. L. & Eq., 47; *Coleridge*, J., in *Foster vs. Mentor Life Ass. Co.*, 3 El. & Bl., 72, 77 Eng.; *Cornish vs. Abington*, 4 H. & N., (Excheq.,) 455. "The rule," says *Bramwell*, B., "is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall afterwards be estopped from denying it." S. C. 556. See, also, *Erle*, C. J., in *White vs. Greenish*, 11 Com. B. (J. Scott) N. S., 229, 103 Eng. C. L. Upon the facts alleged in the fourth plea, the language of *Ruffin*, C. J., is in point. "Surely," he says, "it would not comport with the good faith that should actuate every government, if the State was to turn around immediately after inducing this further expenditure by the company, and getting the work done, and insist upon a forfeiture." *Atto. Gen. vs. Petersburg and Roanoke R. R. Co.*, 6 Iredell, 470–71.

It was further contended, that independently altogether of the Code, p. 397, art. 59, sec. 10, there was error in the opinions given at the trial upon the general issue. The instruction to the jury (p. 20) that the charter and corporate powers and franchises may be annulled for a failure to maintain and keep *bridges* in good order and repair, is a forced construction of the 13th, and utterly inconsistent with the 14th section of the charter. A duty is only prescribed with regard to the *road* itself. Even as to the road itself, it was not intended by the parties to the contract, that the charter and corporate powers and franchises should be liable to be annulled, if the *road* had *any one* day come short of the precise state of order and repair in which it was required to be

when gates were first erected upon it. Such a construction is forbid by the 26th section, under which the inquisition would have to find it to be "out of good order and repair;" that is, "not in a good state of general repair," (*People vs. Bristol and Rensselaerville Turnpike Co.*, 23 Wend., 232--3,) "*for the space of fifteen days*," at least. Unless the charter and corporate powers and franchises can be vacated and annulled for what would be insufficient to maintain a proceeding under the 26th section, there would seem to be error in the instruction which required the jury to find a verdict for the plaintiff, if they believed "that the defendant had, *at the time of the passing of the act of* 1860, ch. 326, given in evidence, failed and neglected to maintain and keep their road, or parts thereof, and the bridges over the streams crossing said road, in good order and repair."

Moreover, looking at the instruction independently of section 26, and viewing the forfeiture of a charter as *Nelson*, C. J. did, (23 Wend. 207--8,) by analogy to the forfeiture of an office, it will be seen that the case in 2 Roll. Abr., 155, Let. N, pl. 2, 3, was cited by Lord *Mansfield* in support of the opinion that "a mere being absent *once*, from attending a session, without any particular circumstances, is no cause of forfeiture." *Rex vs. Wells*, 4 Burr., 2007. Lord *Mansfield's* opinion is approved by *Nelson*, C. J., in *People vs. Kingston and Middletown Turnpike R. Co.*, 23 Wend. 208.

Whether the seventh plea (p. 13) was sufficient or not, it was, on the general issue, incumbent on the plaintiff to prove the whole of his case, 2 Tidd.'s Pr., 849; Steph. on Pl., ch. 2, sec. 3, rule 1, p. 378; to prove the allegation in the *scire facias*, that the defendants have *wilfully*, and for a long time, neglected and failed to keep their road, &c., in good order and repair; and this allegation of *wilfulness* being material, evidence was admissible to disprove it. *Lush vs. Russell*, 5 W. H. & G., (Excheq.) 203. Yet, according to the fifth bill of exceptions, (p. 19,) the plaintiff "offered evidence to the jury tending to show the *wilful* neglect of the defendant to keep its road in repair;" and when the defendant offered evidence to show there was no *wilful* neglect, his evidence was rejected!* The court seems to have regarded the opin-

* All the evidence offered for the plaintiffs being admitted, and that offered for the defendants being rejected, a verdict was then found that the defendants have *wilfully*, and for a long time, neglected and failed to keep their road, &c., in good order and repair.

ion of *Cowen*, J., in *People vs. Hillsdale and Chatham Turnpike Co.*, 23 Wend., 258, more than the opinion of *Nelson*, C. J.,* in *People vs. Kingston and Middletown Turnpike R. Co.*, 23 Wend., 211, approved by the appellate court in *Thompson vs. The People*,† 23 Wend., 584, 586, and more than the opinions of the Judges of the Supreme Court of Pennsylvania, in *Erie and N. E. R. R. Co. vs. Casey*,‡ 1 Grant, 285, 293; 2 Casey, (26 Penn.) 319.

Other grounds were taken, involving the rights of the company under the Constitution of the United States, and the effect of the decision in the case of the *Charles River Bridge vs. Warren Bridge*, 11 Peters, 419. But all the grounds taken on behalf of the company were overruled, as will be seen by the opinion, (p. 2 to 6 of Record,) and the report of the case in 19 Maryland Rep., 239.

As to the Grounds before the State Courts, taken particularly under the Constitution of the United States.

By the directions upon the general issue which are stated in the 5th and 6th exceptions, and by express averment as well as by necessary intendment in several of the pleas, especially in the 1st, 2nd, 5th and 6th, there was in respect to the *object of this suit* (as distinguished from the *mere con-*

* "A substantial performance according to the intent of the charter, is all that is required." "Slight departures are overlooked. The leaning of the law is against the party claiming the forfeiture." *Nelson*, C. J., 23 Wend., 211.

† "I cannot bring myself to say, with the able but unscrupulous attorney general of Charles II, that "if courts be doubtful of the facts, the best and safest way is, that judgment be given of seizure," *Verplanck*, Senator, 23 Wend., 584. Courts will lean against forfeiture, and will construe conditions going to defeat an estate in favor of the grantee, so far as is compatible with the plain intent of the condition. Moreover, a minute and literal compliance with the very letter of the condition, is not required to support and preserve the estate, as it is in respect to conditions precedent necessary for creating and vesting it." S. C., 585.

‡ "There can be no abuse or misuse without a positive act of malfeasance. This, to furnish ground for forfeiture, must be *wilful*. It must be something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power." *Lewis*, C. J., 1 Grant, 285. "We are to understand these words as importing something more than involuntary misconduct or mere technical wrongs—something that implies a high degree of turpitude—a wilful malfeasance, a species of misdemeanor." *Woodward*, J., Ib. 293. *Black*, J., in delivering the opinion of a majority of the court, lays down "that it must be *wilful*, that is *not involuntary*." 2 Casey, (26 Penn.) 319.

struction of the branch railroad,) drawn in question the validity of the statute of the 22nd of February, 1830, and of the statute of 1860, and of the authority exercised under the State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; and there was drawn in question the construction of the first clause of the 10th section of the 1st article of the Constitution of the United States, and the decision is against the right claimed under this clause. The record shows that these questions were necessarily involved in the decision; and that the judgment which was given could not have been given without deciding thereon.

Writ of Error under 25th section of Act of 1789.

On a petition to the Chief Justice of the Supreme Court of the United States, (p. 22 to 24) a writ of error was awarded under the 25th section of the act of Congress of 1789, (p. 24) and there is an assignment of error with a prayer for reversal, (p. 27.)

POINTS BEFORE THE SUPREME COURT OF THE UNITED STATES; AND AUTHORITIES RELIED ON.

I. Under the charter of 1812 there is a contract, the obligation of which cannot, consistently with the Constitution of the United States, be impaired by any State Law; *Fletcher vs. Peck*, 6 Cranch, 135-'6-'7; *State of New Jersey vs. Wilson*, 7 Ib., 166; *Dartmouth College vs. Woodward*, 4 Wheat, 641; *Green vs. Biddle*, 8 Ib., 92; *Gordon vs. Appeal Tax Court*, 3 *How.*, 133; *East Hartford vs. Hartford Bridge Co.*, 17 Conn., 92; *Ohio Life Ins. & Trust Co. vs. Debolt*, 16 How., 430; *State Bank of Ohio vs. Knoop*, Ib., 569; *Boston & Lowell Railway Corpo. vs. Salem & Lowell Railroad Co.*, 2 Gray, 29; *Dodge vs. Woolsey*, 18 How., 331; *Jefferson Branch Bank vs. Skelly*, 1 Black., 436; *Bridge Proprietors vs. Hoboken Co.*, 1 Wallace, 143.

II. This Court is to consider whether the contract is violated by the construction placed upon the charter of 1812, or by the decision as to the validity of the statutes of 1830 and 1860, and the authority exercised under the State. *Armstrong & Co., v. Treasurer of Athens County*, 16 Peters, 285; *Curran v. State of Arkansas, &c.*, 15 How. 320; *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 143-4.

III. The rules which govern in the administration of justice forming a part of every contract, whether with the State or with individuals, (*Erie and N, E. R. R. Co., v. Casey* 1 Grant, 283.) the Court in construing the charter is not to adopt a forced construction against the company but is to apply such rules as are applicable to other instruments in cases between individuals: *Kellogg v. Union Co.*, 12 Conn. 18; *Boston and Providence R. Corpo. v. Midland R. Co., &c.*, 1 Gray 369; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 221. It is to apply the same rule as to impossibility of performance, and hold that such an act of the obligee or of the law as would excuse non-performance of the condition of a contract between individuals will in like manner excuse non-performance of the condition of a charter granted by the State, *People v. Kingston & Middletown Turnpike R. Co.*, 23 Wend. 206–208; *Thompson v. People*, Ib 586.

IV. The covenanter is discharged from the obligation when the party for whose benefit it was made has performed an act by which the covenanter is incapacitated to observe his contract; Platt on Cov., part 6, ch. 2, p. 595. Many pertinent cases of an early period are cited in 1 Roll. Abr., 453, 4 tit. *Condition* N; Id. 455, *Condition* (P); 5 Vin. Abr., tit. *Condition* (M. c.); Id. 243, 4 tit. *Condition* (N. c.). An action in 3 H. 6, against a mill maker for not erecting a mill, could not be maintained when the obligee had said that he would not have the mill, and discharged the obligor from erecting it. 1 Roll. Abr., 453, 4 tit. *Condition* (N), pl. 5; 2 Man. & Gr., 746, note (a).

In the case in 9 H. 6, of *Joan Queen of England* (widow of Henry IV.) *vs. Lyle*, where the condition was to repair a mill, it was a sufficient plea that one A, by command of plaintiff, disturbed defendant from repairing and would not suffer him to do the repairs; 1 Roll. Abr., 453, pl. 4; 2 Man. & Gr., 746, note (a).

Where the condition was that one should serve the obligee a certain term of years, there was no forfeiture if the service was tendered and refused; or if the obligee licensed the servant to go, though the license was by parole; M. 6., E. 4, fo. 12, pl. 4; Br. Abr., tit. *Licenses*, pl. 18; 1 Roll. Abr., 455, tit. *Condition* (P), pl. 1; 5 Vin. Abr., 242, tit. *Condition* (M. c.), pl. 5; Man. & Gr., 744, note (b); 2 Doug., 688.

In an action upon a covenant to frame and raise a house

upon the obligee's land, it was a good plea that plaintiff would not suffer defendant to raise the house thereon; Tr. 18. E. 4, fo. 8, pl. 12; M. 19, E. 4, fo. 2, pl. 6; 1 Roll. Abr., 453, tit. *Condition* (N), pl. 3; 5 Vin. Abr., 244, tit. *Condition* (N c.), pl. 3, 6; Shep. Touch., 174.

So a man was excused who covenanted to collect the obligee's rents in a certain town, and was in the collecting thereof interrupted by the obligee; 13 H., 7; Keilw. 34, b; 5 Vin. Abr., 244, tit. *Condition* (N c.), pl. 7.

Thus it became established that, if the obligee himself be the cause that the obligation cannot be performed, there is no forfeiture; for it is his own act; 4 H. 7; Br. Abr., tit. *Condition*, fo. 152, pl. 127; 5 Vin. Abr., tit. *Condition* (N c.), pl. 23; or as is elsewhere expressed, that if the plaintiff himself be the cause of disablement, so as the condition cannot be performed, he shall not take advantage of the condition. 28 & 29 Eliz., Godb. 76, pl. 90; 5 Vin. Abr., 246-'7, tit. *Condition* (N). pl. 25.

In 32 Elizabeth there was an action on a covenant that a third person, to whom plaintiff had leased lands for £40 per annum, should pay the £40. To the plea that before the day of payment the plaintiff ousted B of his farm, it was objected that the same was collateral, and not for rent issuing out of land; but the plea was held good; for here is *quid pro quo*, and here the consideration upon which the covenant is conceived, to wit: the farm and the occupation of it, is taken away by the act of the plaintiff himself. *Bedel's* case, 2 Leon., 115, 3 Id., 159. See also in 37 Eliz., *Carroll vs. Read*, Owen 65, Cro. Eliz. 374, Moore 402, *Shep.*, Touch. 174, 5 Vin. Abr., tit. *Condition* (N c.), pl. 246; in 40 Eliz., *Morris vs. Lutterel*, Cro. Eliz. 672; in 43 Eliz., *Lutterel's* case, 4 Rep. 87 a; in 5 Jac., 1 *City of London vs. Greyme*, Cro. Jac. 182, Moore 877; in 7 Jac., 1 *Francis's* case, 8 Rep. 92 a. 5 Vin. Abr. 244, tit. *Condition* (N c.), pl. 9; and in 12 Jac. 1, the case of the lessor, out of whose chimney sparks of fire came into an house not much remote, by which the lessee's house was burnt; and this coming by the lessor's act, excused the lessee for not performing his covenant to rebuild. 5 Vin. Abr. 244, tit. *Condition* (N c).

In 13 Jac., 1, was *Quick, &c., vs. Ludborrow*, 3 Bulstr., 30; and *Slade vs. Thompson*, Cro. Jac., 374. The latter case is more fully reported elsewhere. 1 Roll., 136, 198. A

remainder in fee being devised upon condition to pay £4 yearly, and the heir being a minor and in ward to the King, the payments were not made according to the condition. *Coke*, C. J., said: "Here these payments could not be made. the issues and profits being in the King's hands, and so by reason hereof no breach of the condition to give an entry for the non-payment of these sums during this time." *Doddridge*, J., said: "As to this payment, nothing is here left to satisfy this but that only which riseth out of the land, to wit: the issues and profits of this; and if this be in the hands of one who is not subject to the condition, it is then impossible for him to pay the same; and this is not to be resembled unto any other case so properly as to the case of eviction." *Haughton*, J., agreed herein: "This is a condition which hath also a condition in itself, to do and perform this so long as he hath the profits. The case of eviction proves this plainly, as where a lease is made of two acres with a condition to pay a rent, one of them evicted by an eign title, the condition by this is gone; so here in this case the land being in the King's hands, the non-payment of these sums according to the condition during this time is no breach of the condition." 3 Bulstr., 58–60; Hardr., 16; 1 Roll. Abr., 451, tit. *Condition* (H), pl. 2; 5 Vin. Abr., 234, tit. *Condition* (M c.). pl. 2; 2 Bac. Abr., tit. *Condition* (Q), sec. 2, p. 6—of Lond. ed. 1832.

Lord *Coke* mentions cases where the feoffor and obligee being the cause, that the condition could not be performed could not take advantage of the non-performance thereof; and he says, "this is regularly true in all cases." Co. Lit., 206b; 5 Vin. Abr., 257, tit. *Condition*, (Nc) pl. 31. See also Shep. Touch., tit. *Covenant*, p. 175, and tit. *Obligation*, p. 383; and *Twiford vs. Buckley*, Carter, 205.

In 4 Car., 1, upon an inquisition and *scire facias* thereon, against one holding office, he, as to some of the times of absence found in the inquisition, pleaded that he was in prison, and in execution at the King's suit. There was doubt whether that should not excuse him; and to avoid this question it was conceived that the King should not give evidence of these times of absence—there being many other causes of forfeiture of the office. *Rex vs. Rooks*, Cro. Car., 491. See also Com. Dig., tit. *Condition*, (Lb.)

Such was the law as it was taken when the charter of 1812 was made, and according to which that charter ought to

be construed, 2 Inst., 263, and such is still the law. *Platt* on Cov., part 6, ch. 2, p. 594--5; *People vs. Bartlett*, 3 Hill, 570; *Cort vs. Ambergate &c. Railway Co.*, 17 Adol. & El. N. S., 146. 79 Eng. C. L.; *Pole vs. Cetcovitch*, 9 Com. B. (J. Scott) N. S., 438, 442, 99 Eng. C. L.; *Royal Mail Co. vs. Mail Steam Packet Co.*, 10 Com. B. (J. Scott) N. S., 867, 100 Eng. C. L,

Equally well established is the rule that no suit can be maintained for non-performance, where such non-performance is caused by a law of the State. It was well established before and at the time of the charter of 1812, *Abbot of Westminster vs. Clark's Ex'ors*, 1 Dy., 28^{b}; *Brewster vs. Kitchen*, 1 Lord Raym, 321; S. C. (*Brewster vs. Kitchell*,) 1 Salk., 198; and it is well established now. *Davis vs. Cary*, 15 Adol. & El. N. S. 425, 69 Eng. C. L.; *Presb. Church vs. City of N. Y.*, 5 Cow., 641--2. It has been acted on in England recently (in 1861) by the Court of Common Pleas, in an action against the Corporation of London, on bonds with condition to pay certain annuities out of tolls payable by virtue of acts of Parliament for improving the navigation of the river Thames westward of London Bridge. The tolls were collected and the annuities paid, until the passage of the Thames Conservancy act, 20 and 21 Vict., 147, the operation of which was to take away from the Corporation of London the legal right to receive the tolls out of which the annuities were payable. This act of law, preventing performance of the condition, was held a good defence to the action. *Williams*, J., said: "The effect of the statute of 20 and 21 Vict., c. 147, is this, that whereas, the obligation was that the Corporation of London should pay these annuities out of the proceeds of certain tolls, the statute has brought it about that the corporation no longer have any power to collect these tolls." "They have been prevented from receiving the fund out of which the annuities are charged, and consequently, from discharging the duties imposed upon them as obligors." There was, therefore, judgment for the defendants. *Brown vs. Mayor, &c., of London*, 9 Com. B. (J. Scott) N. S., 726, 99 Eng. C. L.

Quite pertinent to this case, is the language of *Marshall*, C. J., in 1810: "The Constitution as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would it have been a defence in such a

suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up." *Fletcher vs. Peck*, 6 Cranch, 139. If such a defence could not be set up, would it, in a suit against the State for depriving the company of what it was entitled to under its charter, have been a defence to say that the State had passed a law preventing the company from performing the duties imposed upon it by the charter, and then had taken away the charter because those duties were not performed?

The cases of the *Charles River Bridge* against the *Warren Bridge*, 11 Peters, 419, and *Washington & Baltimore Turnpike Road vs. Baltimore & Ohio R. R. Co.*, 10 Gill & J., 392, relied upon by the Court of Appeals of Maryland, (Rec. p. 4, 5,) do not answer this view; nor do they authorize the State to hold her present position. The owner of land on which there is a mill and a stream of water to its wheels, though he had made to another a lease of the mill on condition of his working it, might construct another mill and put it in operation, and divert to the second mill the water which had before run to the first; but after he had, by such diversion, prevented the condition from being performed, he could not, in a court of justice, maintain a suit for its non-performance. So the State, after granting to a turnpike company a charter, with power to take tolls on persons and property passing on the turnpike, though on condition of keeping the turnpike road in good order and repair, may pass a law for the construction of a railroad, and put it in operation, and divert to the railroad persons and property which would have passed on, and tolls which would have been received on the turnpike, had the railroad not been made; but after the State has, by such diversion, prevented the condition from being performed, it cannot, in a court of justice, maintain a suit for the non-performance.

Upon the facts alleged in the first and second pleas, (p. 9, 10,) and admitted by the demurrers thereto, the Constitution of the United States is violated, when, by an authority exercised under the State, there is pronounced against the company judgment of forfeiture for not keeping its road in order, after the State has, through a State law, deprived the company of the means of keeping the road in better order. The obligation of the contract is impaired by a law of the State, when by means of an authority exercised under the State,

there is taken, without compensation, what was granted by the charter. Suppose the State of Maryland had passed a law in plain and direct terms, prohibiting all tolls from being received on the turnpike, and after thus taking from the company all means of keeping its road in good order, had then proceeded by *scire facias*, upon the ground of its not being kept in good order, surely a judgment thereon, vacating the charter, would impair the obligation of the contract. And the present judgment is liable to the same objection, when it appears that under a law of the State, there has been taken from the company part of its income, and with the remainder the road cannot be kept in any better order than it now is.

Nor will this doctrine require the existence of roads impassable or dangerous, or prevent better improvements either by the State herself, or by another company. *Boston Water Power vs. Boston & Worcester Railroad*, 23 Pick., 295; *Central Bridge Corpo. vs. City of Lowell*, 4 Gray, 481. "If it comes to this, that public faith is to be violated, or the benefit of such improvements lost," the Supreme Court of Connecticut has well said, "banish the improvement! The community will profit more by preserving public faith, than they will gain by its violation; although for a time it may seem otherwise." But, as the court said, neither course need be taken. "There is a conservative principle by which the improvement may be made, and good faith preserved. It is this: that private property may be taken for public use, upon compensation made." *Enfield Toll Bridge Co. vs. Hartford & New Haven Railroad Co.*, 17 Conn., 58–9. Notwithstanding there was an information in the nature of a *quo warranto*, the court, when, as in this case, there was no provision for compensation,* would not allow the charter to be invaded in *Washington Bridge Co. vs. The State*, 18 Conn., 53. See also *Erie & N. E. R. R. Co. vs. Casey*, 1 Grant, 294, 295, 298.

V. This court said in 1810, "if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates." *Fletcher vs. Peck*, 6 Cranch, 135. In 1830, when the question was whether a grant of land to C. was impaired by a

*The second plea (p. 10) distinctly alleges that "no such compensation has been made;" and this fact is admitted by the demurrer.

subsequent act of assembly, or an award made under it, the court said: "The State has not, by this act, impaired the force of the grant; it does not profess or attempt to take the land from the assigns of C, and give it to one not claiming under him, neither does the award produce that effect. *The grant remains in full force, the property conveyed is held by his grantee, and the State asserts no claim to it.*" *Jackson vs. Lamphire*, 3 Peters, 289. This is recognized in *Charles River Bridge vs. Warren Bridge, &c.*, 11 Peters, 549, notwithstanding the intervening case of *Mumm vs. Potomac Co.*, 8 Peters, 287. When this case was cited in 1853, this court considered that a charter might "contain provisions which, when acted on by the State and by third persons, constitute in law a binding contract with them, the obligation of which cannot be impaired." It said: "If a person deposit his property in the hands of an agent, he may revoke the agency and withdraw his property at his pleasure. But if he should request third persons to accept the agent's bills, informing them at the same time that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such assurance the agent's bills are accepted, the principal cannot, by revoking the agency, acquire the right to withdraw his property from the hands of the agent. It is no longer exclusively his. They who, on the faith of its deposit, have changed their condition, have acquired rights in it. The matter no longer exists in a mere delegation of a revocable authority to an agent, but a contract has arisen between the principal and the third persons, from the representation made, and the acts done on the faith of it, and the property cannot be withdrawn without impairing the obligation of that contract." The court considered that the charter, followed by a deposit of capital, amounted to an assurance held out to the public by the State, that any one who should trust the bank, might rely on that capital for payment. And it said that "when a third person acted on this assurance, and parted with his property on the faith of it, the transaction had all the elements of a binding contract, and the State could not withdraw the fund, or any part of it, without impairing its obligation." *Curran, &c., vs. State of Arkansas*, 15 How., 313--14; *Bacon, &c., vs. Robertson, &c.*, 18 How., 486--7.

Taking the allegations in the fifth and sixth pleas in connection with section 31 of the charter, the State must be

held to have contracted with the company in contemplation of such a demise as is authorized by that section. Effect must be given to the demise to the full extent contemplated by the statute. The subject authorized to be granted must be held to pass for the full term of seven years; and during this term the State cannot, through any tribunal, impair that demise.

In England there are many turnpike acts giving power to mortgage the tolls. *Doe vs. Booth*, 2 Bos. & Pul., 219; *Doe vs. Lediard*, 4 Barn. & Adol., 137; 1 Nev. & Man., 683; *Doe vs. Penfold*, 3 Adol. & El. N. S., 757, 43 Eng. C. L. Each mortgagee is held entitled, if not paid, to possess himself of the mortgaged premises. Under such circumstances there is no instance of a judgment on either a *quo warranto* or a *scire facias*, vacating the corporate rights and franchises.

In the United States the provision of the Constitution against impairing the obligation of contracts, protects the contract for the demise, and the demise itself in like manner, as the lien of the lenders on the canal and tolls was protected in *Wabash & Erie Canal Co. vs. Beers*, 2 Black, 448. The case of *Woodruff vs. Trapnall*, 10 How., 190, and *Curran vs. State of Arkansas*, are distinctly recognized in *Hawthorne vs. Calef*, 2 Wallace, 21.

VI. Upon all the grounds appearing on the record, the judgment should be reversed, and final judgment given for the company; or a new trial awarded.

DOBBIN AND ROBINSON,
For Plaintiffs in Error.